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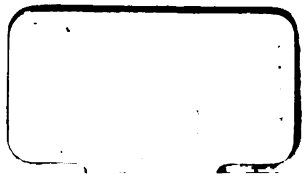

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

DURING THE YEARS 1876-7-8.

REPORTED BY

GEORGE P. RANEY, ATTORNEY-GENERAL.

VOLUME XVI.

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1906.

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.
HON. JAMES D. WESTCOTT, JR., } Associate Justices.
HON. R. B. VAN VALKENBURGH, }

ATTORNEY-GENERALS.

WILLIAM ARCHER COCKE,
GEORGE P. RANEY.*

CLERKS SUPREME COURT.

FREDERICK T. MYERS,
CHARLES H. FOSTER.†

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT—	HON. W. W. VANNESS.‡
	HON. AUGUSTUS E. MAXWELL.§
SECOND CIRCUIT—	HON. P. WOODSON WHITE.‖
THIRD CIRCUIT—	HON. WILLIAM BRYSON.
FOURTH CIRCUIT—	HON. ROBERT B. ARCHIBALD.
FIFTH CIRCUIT—	HON. JESSE H. GOSS.¶
	HON. JAMES B. DAWKINS.††
SIXTH CIRCUIT—	HON. WINER BETHEL.‡‡
	HON. H. L. MITCHELL.§§
SEVENTH CIRCUIT—	HON. JOHN W. PRICE.‖‖
	HON. WM. ARCHER COCKE.§§

*Appointed January 3, 1877, *vice* Wm. Archer Cocke, term expired. †Appointed January 20, 1877, *vice* Frederick T. Myers, resigned. ‡Resigned April 1, 1877. §Appointed April 2, 1877, *ad interim*. ‖Term expired and re-appointed June 22, 1877, *ad interim*. ¶*Ad interim* appointment expired January, 1877. ††Appointed January 13, 1877. ‡‡*Ad interim* appointment expired January, 1877. §§Appointed January 20, 1877 ‖‖*Ad interim* appointment expired January, 1877. §§Appointed January 10, 1877.

IN MEMORIAM.

CHARLES H. DuPONT.

At a meeting of the bar of the Supreme Court on Saturday, January 19th, 1878, in the Supreme Court Room, Hon. George S. Hawkins was elected President and George P. Reney, Esq., Secretary.

On motion, the President appointed the following committee on resolutions: David S. Walker, Sr., of Tallahassee, R. C. Campbell, of Pensacola, and E. J. Vann, of Madison. The committee retired, and after a short elected President and George P. Raney, Esq., Secretary.

Resolved, That the bar of Florida has received with feelings of profound sorrow the announcement of the death of Hon. Charles Henry DuPont, which occurred at the residence of his son-in-law, Captain William B. Malone, in Quincy, Gadsden county, Florida, on October 14, 1877.

Resolved, That in the death of Judge DuPont, Florida has lost one of her most distinguished citizens. He was born in Beaufort District, South Carolina, on January 27th, 1805, graduated at Franklin College, Georgia, in 1826, and removed to Gadsden county, Florida, in 1827, since which time he has filled many high and responsible positions both in peace and in war, among them the positions of Associate Justice and afterwards Chief-Justice of the Supreme Court of Florida.

Resolved, That in whatever position he was placed he rendered important services to his country, for which and for his virtues in private life his name deserves to be cherished with grateful and lasting remembrance by his fellow-citizens.

Resolved, That as a token of our affectionate regard for him as one of our brethren, and of our gratitude for his services to our profession and our State, we will wear crape on the left arm for thirty days.

Resolved, That the Supreme Court of this State now in session be requested to cause the proceedings of this meeting to be spread upon its minutes, and that a copy thereof be sent by the Secretary to the family of the deceased.

The resolutions were unanimously adopted, and the meeting adjourned.

Upon the opening of the Supreme Court on the same day, Mr. David S. Walker, Sr., addressed the court as follows:

May it please the Court:

On Tuesday last this court, in compliance with its own will, and the unanimous wish of the bar, caused to be entered upon its minutes the followiug order, viz:

"It is ordered that the special business for Saturday, January 19th, 1878, shall be the presentation of suitable resolutions on the death of Hon. C. H. DuPont, and an expression by the members of the court and bar of the esteem in which he was held, for his unblemished character, for his eminent services as a jurist, and for the ability, learning, dignity, and impar-

tiality with which he for many years presided in this court, first as Associate and afterward as Chief-Justice."

The day appointed by your honors having now arrived, I rise at the request of my brethren of the bar to offer resolutions passed by them, and to give utterance in some measure to my own appreciation of the exalted character and services of the illustrious dead.

Charles H. DuPont was born in Beaufort District, in the State of South Carolina, on January 27th, 1805. He lost his father at an early age. His mother, judging from the jewel she gave the world in her son, must have been what the mother of the Gracchi would have been if she had enjoyed, like the mother of Judge DuPont, the chastening influences of the Christian religion. Judge DuPont, in his old age, often spoke of his mother in terms of the tenderest filial affection. Although she had been dead for many years her virtues were as fully impressed upon his heart, and her likeness as clearly photographed upon his memory, as though he had seen her but recently.

When he was about the age of ten years, his mother sent him to be educated in the State of Ohio, partly by working on a farm and partly by going to school. Whether laboring on a farm or going to school contributed most to the formation of the character of the man whose memory we are now assembled to honor, I will not undertake to say. When I reflect on the thousands of educated men whose hands have learned the art of "picking and stealing," simply because in youth they had not been taught the noble art and duty of earning a living by honest labor, I am disposed to think that the mother of Judge DuPont conferred upon her son quite as great a blessing when she caused him to be taught to labor on a farm with his own hands as when she caused him to be taught the knowledge of the school-room and college.

He was transferred from the farm and school in Ohio to Franklin College in the State of Georgia, where he graduated in the year 1826. His college life seems to have been a scene of perpetual sunshine. It was a theme on which he was never tired. He delighted to tell, till his last days, with the joy of youth sparkling in his eyes, the names of his classmates, how they stood in their class, and their respective virtues and talents; and when, in the recital, he came to the names of those who, like himself, had illustrated their family, or rendered services to their country, his face would glow with an emotion which told better than words could do how sincere was the joy of his heart, how exalted the pride of his soul. If they had been his own brothers he could not have rejoiced more in their success. I have often thought how wonderfully heaven blessed this man in enabling him to be so happy in witnessing the happiness of others.

Shortly after he graduated, to wit: in the year 1827, he came to Gadsden county, Florida, and purchased a plantation near Quincy, which he cultivated, and on which he lived, and at the same time he commenced the practice of the law. Strange to say he succeeded both as a planter and as a lawyer. The law, though a jealous mistress, not generally toler-

ating the attentions of her votaries to any but herself, seems in his case to have been so enamored of her favorite that she permitted him to engage in what pursuits he pleased, and yet granted him her favors. Doubtless the ardor of his devotions while at her shrine made amends for his occasional absences in the worship of others.

Being successful both at the law and in planting, he soon collected about him all the comforts and many of the luxuries of life. He built in the town of Quincy an elegant and capacious mansion, which was long the seat of refinement and the very home of hospitality—a hospitality so admirably dispensed that the guest forgot that he was receiving a favor, and felt sure that he was conferring one by partaking of it. Thinking of the hospitality of Judge DuPont in those early days, I am reminded of the description given by the poet Ossian of the hospitality of one of his heroes:

"The light of heaven was in the bosom of Cathmor; his towers rose on the banks of Arha; seven paths led to his halls; seven chiefs stood on the paths to call the strangers to the feast; but Cathmor dwelt in the wood to avoid the voice of praise."

The voice of his fellow-citizens, however, did not long permit our Cathmor to dwell in the wood of retirement. Soon it called him to be the judge of the county court of Gadsden, then to represent his county in the House of Representatives, and then in the Senate.

Returning to the enjoyments of private life, to the practice of his profession, and the cultivation of his plantation, his days seemed destined to float down the stream of time without a ripple.

But how little do we know what changes a day may bring about. How fallacious are the hopes of man. Amidst the domestic, professional, and social bliss which Judge DuPont was at this time enjoying, and expecting a long duration of, there came upon the still air, in the year 1836, the wild war-whoop of savage Indians, followed by the screams of women and children under the inflictions of the tomahawk and scalping-knife. The people cast around hurried glances in search of a man suitable to lead them to war. They soon found such a man in Charles H. DuPont; him they elected their General, and he led them to the field, teaching them on the march and in the camp to regard him as a tender father, but in the hour of battle as the fierce avenger of murdered women and children, and themselves as his instruments.

It is for the pen of the historian to tell how well he discharged his duties as a soldier.

He continued in the military service till the end of the war, and again returned to the walks of private life and the enjoyment of the large estate which he had now accumulated. But scarcely had he time to contemplate his fortune before securing debts, arising out of endorsements for friends and a banking institution with which he had been connected, swept the whole away and left him without a dollar. The accumulation of years had vanished in a day. From being a man of great wealth he was now penniless.

What should he do? Should he give himself up to despondency, and spend the balance of his life in making his friends miserable by telling them how miserable he was himself? Should he take to the bottle for consolation? Should he ask God to terminate his miserable existence? Not so, thought Judge DuPont. There were still enough happy people in the world to make him happy by looking at them. He was yet in the prime of life, and said to himself: "It is true I have lost one fortune, but enough of life and strength are left me to make another," and so without a word of repining he went to work and did make another even larger than the first.

Thus again, in the midst of domestic happiness and surrounded with all the comforts and luxuries which wealth can give, he was willing thus to spend the balance of his days. But his friends said to him, this must not be. You must go up higher. You must be one of the Associate-Justices of the Supreme Court of our State. You have shown us how to bear prosperity and adversity; you have shown us how to plant and how to practice law, how to preside as county judge, how to fight a savage foe, how to perform the duties of Representative and Senator, and now we want you to go into the Chief Temple of Justice and minister as High Priest at her sacred altars.

"He was not made of stone;
But flesh and bood like other men,
And subject to their kind entreaties."

So he accepted the office of Associate-Justice in 1854, and served until his term expired, and was then promoted in 1860 to the office of Chief-Justice of the Supreme Court of the State, which he continued to hold until two and a half years after the late civil war, when the reconstruction act of Congress remitted him once more to the sweets of private life.

The manner in which he discharged his duties as a member of this court is best shown by the Florida Reports, from volume six to volume twelve inclusive. From a perusal of his opinions in those volumes it will be seen that he was an able, honest, learned, studious and industrious judge, and these reports will be a noble monument to his memory, so long as men shall continue to revere the great principles of our judicial system. But his firmness, dignity, gentleness, blandness of manner, his noble bearing and courteous demeanor toward the other members of the court and the members of the bar, particularly the younger members; do not and cannot and do not appear in the reports, and will be forgotten when his contemporaries shall like himself have passed away.

When Judge DuPont retired from the office of Chief-Justice into private life, after the war, he had become an old man. His fortune which, as we have said, was ample, had now again vanished, and he was a poor man, for though he was still the owner of large bodies of land, yet, as his lands were not saleable and as he had no laborers with whom to cultivate them, they became a tax and a burthen instead of a blessing. In addition to this, he owed some debts which he could have payed without difficulty in previous years, but which now pressed upon him with the weight of a

mountain. But he did not repine and despond and die out of his difficulties as some have done. Far from it. He knew that his respectability did not depend on his possessions or on his positions. He recognized the truths taught in the couplet—

"Honor and fame from no condition rise—
Act well your part, there all the honor lies."

He would have considered it a greater honor to be a good Justice of the Peace than a bad Chief-Justice of the Supreme Court. He would have considered it a greater honor to be an honest day-laborer than a dishonest President of the United States.

Nor was his happiness in the slightest degree interfered with by this change in his circumstances, for his happiness had always been derived, not from wealth or power, but from doing the very best he could in whatever situation Providence might please to place him, and in witnessing the happiness of others.

Under the influence of these teachings he maintained a resolute soul and a cheerful face. He sold his fine house in town to pay a debt, and removed to his plantation in the country where he commenced life in 1827, and there, at the age of seventy years, he engaged with his own hands in the cultivation of his crops with as much ardor and perseverance as he had displayed in his youth. Through the cold of winter and the heat of summer, day after day, week after week, month after month, and year after year, for eight long years, he was there seen bravely laboring with his axe, or hoe, or at the plow-handles.

But not for one hour during this protracted effort to secure the necessaries of life for his family did he cease to think of the public welfare. He organized an agricultural society in his own county, and by his numerous writings and public addresses endeavored to rouse his countrymen from the lethargy in which the war had left them into renewed energy and prosperity, his daily example being even more eloquent than his words.

The agricultural society of this State owes it to itself to write a history of his efforts in its behalf.

At length, his political friends having gained ascendancy in the State, Judge DuPont once more heard the voice of his country calling him into her service. She desired him to accept the important mission of visiting the States of the great Northwest, of setting forth the advantages of his beloved Florida, and inviting immigrants to come and live within her borders. When this call was made upon him, Judge DuPont was suffering as none can suffer, except those who experience a similar calamity. He had just lost the wife of his youth, a most lovely and excellent lady, to whom he was very tenderly attached. He had been able to bear the loss of property, the loss of office, and the pressure of poverty and old age without a murmur, but this blow was too heavy for him. At first he did not respond to the call, but after an interval of some weeks, by the aid of his strong will, he rallied and signified his readiness to enter upon the duties assigned him.

I can well imagine that at this period he felt the sentiments, if he did not use the language, of Fingal:

"The days of my years begin to fail; I feel the weakness of my arm; my fathers bend from their clouds to receive their gray-haired son. But before I go hence one beam of fame shall rise; so shall my days end as my years begun, in honor; my life shall be one stream of light to bards of other times; I will leave my fame behind me like the last beams of the sun when he hides his red head in the West."

He visited Tallahassee, the mere shadow of his former self, a noble spirit almost disembodied, to make preparations for his long journey, and these being completed he immediately commenced it.

His strong will and great hope of being useful to his State sustained him till he reached the city of Minneapolis, in the far Western State of Minnesota. There death laid its cold hand upon him, and we soon received a telegram from Col. Stevens and Dr. Fell, to whom the gratitude of Florida is forever due for their kindness to him, informing us of his extreme illness. A loving and beloved son hastened to him. He insisted on being brought immediately back to his dear Florida, and would listen to no suggestions of delay. He reached Quincy on October 13, 1877, thanked God that he had been permitted once more to see his home, his family and his friends, and on the next morning, a beautiful Sunday morning, at five minutes to seven o'clock, in the house of his son-in-law, Captain Wm. B. Malone, surrounded by his weeping children and friends, and lamented by all the people of his State, he calmly yielded up his noble spirit to the great God who gave it.

"To live with fame
The Gods allow to many, but to die
With equal luster, is a blessing beaven
Selects from all her choicest boons of fate,
And with a sparing hand on few bestows."

I must add that from his earliest manhood, through all the vicissitudes of his checkered life, as a lawyer, as a planter, as a statesman, as a judge, as a general, in poverty and in wealth, in prosperity and in adversity, he was an humble, ardent, devout, active and leading member of the Methodist Episcopal Church.

Semper paratus, the motto of his native State, he had adopted as his own, and when the final summons came it found him *ready*.

Having now contributed my leaf to the chaplet with which we are met to crown the memory of our lamented friend, I give way to others who will follow me, and who are more able than myself to speak of his services to his country and to delineate the strong points of his intellectual and moral character.

He has done the work of a good man—
Crown him, honor him, love him;
Weep over him tears of woman,
Stoop manliest brows above him!

In conclusion, I have the honor to submit to the court the following tribute from the bar, to-wit: (Mr. Walker then read the preceding resolutions.)

Mr. George S. Hawkins then spoke as follows:

May it please the Court, and Gentlemen of the Bar:

We meet here to-day to pay a sad but pleasing tribute to the memory of the late Hon. Charles H. DuPont.

He has ceased to live; his decease is but another illustration of the awful *fiat* enunciated in the Magna Charta of our existence, that all must die; but we must remember that it is as natural to die as to live, and that nature, sooner or later, will enforce her inexorable decrees.

We meet not here to go through the formal ceremonial of pronouncing eulogies, replete with fulsome adulation, but we come, I believe, with one accord, one heart, one voice, to record a heartfelt testimonial of the worth, the merit, and the virtues of our departed brother. Such a testimonial, connected as it will be with the judicial records of the Supreme Court of our State, will long remain, and it may possibly become his most appropriate epitaph, his most suitable monument.

It was my good fortune to have formed the acquaintance of Judge DuPont many, very many years since. This acquaintance ripened into an intimacy and friendship which were never lessened or disturbed by any untoward event of the efflux of time; a circumstance unimportant in itself, further than it enables me to testify as to his high honor, his integrity, his moral and physical courage and bravery.

His patriotism, pure and unselfish, at the first outbreak of our Indian wars, impelled him to take the field. He became distinguished as an efficient officer for his brilliant courage, his manly bearing and chivalry, and performed great and valuable service in behalf of his country.

It may be superfluous to speak of his judicial career that is inscribed on the records of our highest legal tribunal, but we know that he was an able, laborious, painstaking judge; that his decisions were replete with an intellect of no common order, learning and research—decisions that will bear the test of time, of the ordeal of criticism.

His judicial integrity was never impugned—indeed so perfect was it that the very snows from heaven would have sullied the purity of his ermine.

It was the custom of an ancient people on the death of a distinguished citizen, in lieu of that praise so often undeservedly lavished upon the dead, or that "flattery" that could not "soothe the dull, cold ear of death," to appoint an accuser, whose duty it was descant upon the faults, the vices, perhaps the crimes of the departed. The unblemished career and high character of Judge DuPont would afford such an accuser no theme for accusation, no basis for critical or malicious attack.

In his later years, adversity had thrown its sombre hue over his declining years, and he became the embodiment of the saying of a writer of antiquity, that a "virtuous man struggling with adversity is a sight worthy of the Gods."

We know that he became the recipient of an appointment which would no doubt have conferred great benefits upon our State. The duties incident to the office were too arduous for his strength, and his health became

seriously and alarmingly impaired; receiving, as he believed, a summons from that fell messenger, whose errand there was no gain-saying, he returned from a distant locality whither his duties had called him to die in the land of his adoption—a land that he loved so well.

It must have been a great solace to him in his last moments that he was surrounded by friends, and that he could surrender his last breath in the bosom of his family; to them a solace equally great by the ministrations that love and affection suggest on so sad and trying occasion, and by the reflection, that he would not be "by strangers honored, and by strangers mourned."

In his domestic relations Judge DuPont was irreproachable. I knew him only as a husband and a father—as to these he was a model for imitation; but Governor Walker has assured us that he was a most affectionate son, most scrupulously obeying that beautiful command enunciated in the Decalogue, by his ever honoring his father and his mother. Right well was the promise contained in the commandment fulfilled. He lived some years beyond the span of life allotted to man.

Judge DuPont was a pious and good man; a christian in the true sense of the word. His piety was ever unobtrusive. Devoid of sectarian bitterness or bigotry, it threw a mild and softening influence over his strongly marked character; it taught him that charity without which religion is nothing; to love his fellow-man, charity in all things; it taught him to be lenient to the faults of others, and tolerant of the moral, religious or political opinions of those whose notions and ideas differed from his own.

Next to the foregoing trait of his character, his great and absorbing sentiment was his love of country. Whether in the field, in the halls of legislation, or on the bench, he was always the same. His actions in public life were guided by and the results of the purest and most disinterested patriotism and a strong pervading sense of duty to his fellow-countrymen and the public. No one ever suspected the rectitude of his intentions.

He will long be remembered by every true Floridian; his virtues, his lofty and elevated character cannot be forgotten; and even after death, they will throw forth and leave a lustre upon his memory, like the long train of light that follows the sunken sun.

Peace has its glories, its triumphs, as well as war. As before remarked, Judge DuPont fell a victim to a disease engendered by the severity of the labors incident to the duties of his appointment. By this, he became as much a martyr for the good, the benefit and the prosperity of his State as though he had died on the battle field, amid flaunting banners, the shouts of contending hosts and the roar of artillery. Well and appropriately may be applied to him the somewhat trite lines of the Roman poet:—

Dulce et decorum est pro patria mori.
Et moriens dulces, reminiscitur Argos.

Mr. R. C. Campbell then paid an eloquent and appropriate tribute, which has not been obtained for publication.

Chief Justice Randall then said:—

I had a limited personal acquaintance with the late Chief Justice DuPont,

but brief as it was, I was impressed with the air of candor, probity, christian modesty and simplicity which forced itself upon the consciousness of every one with whom he held intercourse. Every feature of his character, which has been so well remarked upon by members of the bar, seem but to be reproduced as we remember the cheerfulness which beamed from his kindly face on greeting an acquaintance, and the courtly dignity and heartiness which graced his bearing marked and distinguished him as a gentleman of the olden time.

The poet has said:—

"We may make our lives sublime,
And, departing, leave behind us
Footprints in the sands of time!"

Our lamented predecessor not only made his life sublime, but left the stamp of his character, his intellectual qualities and his learning, inscribed upon a monument more enduring than the "sands of time," in the hearts of his fellow-men, in the pages of the jurisprudence of this, his adopted commonwealth, and in the practical discourses and valuable contributions to the agricultural and domestic literature of the time, which were so frequently welcomed from his busy pen.

This much, and more, is due from me as a testimonial of his worth. I acknowledge that I have always consulted his opinions with a respect that was entirely spontaneous, and due to the intrinsic force of the logic and the patent integrity impressed in every line.

The court entirely concurs in the sentiments of the resolutions presented, and it is ordered that they be recorded, together with the proceedings of the meeting of the bar, in the minutes of the court.

The court then adjourned.

IN MEMORIAM.

GEORGE S. HAWKINS.

At a meeting of the members of the bar of the Supreme Court, at the court-room in Tallahassee, on the 11th day of June, 1878, on motion of Mr. Geo. P. Raney, Chief-Justice Randall was elected chairman and D. L. McKinnon secretary. On motion of Mr. D. S. Walker, Sr., a committee of three, consisting of Messrs. C. C. Yonge, D. S. Walker, Sr., and Angus Paterson, were appointed by the chairman to draft suitable resolutions commemorative of the late Hon. George S. Hawkins, deceased. The meeting then adjourned until 9 o'clock A. M., June 17.

The members of the bar met pursuant to adjournment, June 17, 1878.

The committee, through their chairman, Col. C. C. Yonge, of Pensacola, presented the following resolutions, which were adopted:

The committee, appointed at a meeting of the bar of the Supreme Court of Tallahassee on the 11th inst., to prepare resolutions commemorative of the late George S. Hawkins, late member of this bar, and once a member of this court, departed this life on the 15th day of March, A. D. 1878, at his residence in Marianna, Florida, aged about 70 years.

Judge Hawkins was born in the State of New York, and removed to Florida at an early period of its history, about the year 1827. He had been intimately associated with the Territorial as well as the State Government of Florida in various official relations for nearly a half century; and whether as legislator, judge or soldier, had, in all the positions which he had been called to fill, exhibited the same fidelity of purpose, devotion to high principle, courage, learning and ability, for which he was so justly distinguished in private life.

In commemoration of his virtues, and in testimony of the respect and esteem we entertain for our departed brother, be it

Resolved, That we, as members of the profession of which he was so bright an ornament, in common with the people of the State of Florida, deplore the loss we and they have sustained in the death of this distinguished jurist and citizen, a man whose public and private life was without stain, and whose example is so worthy of our imitation.

Resolved, That we tender to his family our sincere sympathy in their great affliction.

Resolved, That the Supreme Court, now in session, be requested to enter this testimonial of our esteem and respect for our deceased brother upon the minutes of the court, and that the court be requested to adjourn for the day.

The meeting then adjourned.

Upon the opening of the Supreme Court, June 18, 1878, Col. Yonge addressed the court as follows:

Since the last term of this court a distinguished member of this bar, and once an Associate-Justice of this court, has passed from the scenes of earth, and his voice, so often heard within these walls, will be heard no more. As is stated in the resolutions I am instructed to report to the court, George S. Hawkins departed this life on the 15th day of March, 1878, at his residence in Marianna, in the bosom of his family and surrounded by his friends. This sad event recalls to the memory the names of many of his contemporaries and friends; also members of this bench and bar, whose names are familiar as household words to the older members of the profession—Anderson, Baltzell, DuPont, Wright, Bronson, Carmack, Jordan, Samuel J. Douglas, Thomas J. Douglas, Thompson, Semmes, Brockenborough, Archer, Papy, Hogue, and others, all of whom have gone before him to their final account.

This long death roll most impressively teaches the lesson of the shortness of life and the certainty of death, and is well calculated to dispel the delusion expressed in the line: "All men believe all men mortal but themselves." It also conveys to us the solemn warning: "Be ye also ready." We know not how soon others may be called on to perform for us the same sad rites we now pay to the memory of our departed friend.

It was my fortune to have had a long and intimate acquaintance with Judge Hawkins, dating back to the time when he first came to Florida,

which, I think, was in 1827. From that time to the date of his death, with occasional intervals, he was connected with the administration of the Government in various official relations. In 1829 he was a secretary of the Territorial Legislature. Afterwards he represented West Florida, which then constituted one Senatorial District, in the Legislature. Then he was U. S. District-Attorney for the Western Judicial Circuit. Then a member of the first State Legislature, representing Franklin county in the Senate. Then Judge of the Western Circuit, and Associate-Justice of the Supreme Court. After this he was Collector of the port of Apalachicola, and subsequently a member of the U. S. Congress. At the time of his death he was engaged in digesting the laws of the State under appointment by Gov. Drew, a work for which he was eminently qualified. Judge Hawkins was found equal to the grave and responsible duties of all these positions, and discharged them with fidelity and marked ability.

But our friend found time to serve his country in the field as well as in the Cabinet. He had a command in West Florida during the Indian war, that ravaged the country from 1835 to 1840, and with the assistance of the late Col. Robert Myers and the now distinguished Gen. W. W. Loring, of the Egyptian army, as his Lieutenants, he fought and won the battle of Alaqua. The courage and gallantry displayed by him in that engagement is yet the subject of remark and admiration by the people of Walton county, and will not be soon forgotten. But as we all must die, so at last has George S. Hawkins died, full of years and full of honors.

[Col. Yonge then read the preceding resolutions.]

Appropriate remarks, commemorative of the character and services of Judge Hawkins, were then made by Mr. D. S. Walker, Sr., Mr. J. F. McClellan and Mr. Raney.

Mr. Justice Westcott, speaking for the court, said:

MR. CHAIRMAN: The resolutions of the bar, which you present, bring to our attention the death of another distinguished and eminent jurist of the State of Florida, the Hon. George S. Hawkins. The court can add but little to what is so well expressed by the resolutions which you, as the representative of the bar, present for enrollment upon our records, We deem it, however, not improper to say something upon this occasion. Judge Hawkins was distinguished as a judge. This the records of this court disclose. Here, likewise, is found the evidence of his general capacity and faithfulness as a lawyer.

For years before his death Judge Hawkins had ceased to take any prominent part in the public affairs of his State, and as he, upon one occasion, remarked to me, he felt that he belonged to the past. With the great changes in our population he ceased to be so generally well known as he was at an earlier period of his life. Then he was prominent in the political contests of the times. He then held the banner which many followed. He then led, as a leader should lead, with a true courage, a thorough devotion, and an untiring industry in the cause he espoused.

At the time of his death he stood one among the few remaining repre-

sentatives of the men who were prominent in the early history of the State. After the excited contests of a not uneventful life, he now yields his spirit to the God who gave it. No pæans of praise are sung by the populace; no general cry of mourning is heard. There is something more attending his departure, however, than the ephemeral sorrow of the crowd or the passing cry of the multitude when one they admire is taken from their counsels.

For years, removed from active public life, he passed the last part of his days in the quiet and industrious pursuit of his profession. The contests incident to the life of a public man were with him things of the past; devotion to professional duties was, for the most part, remembered and practiced.

Passing away under these circumstances, it is the members of the profession to which he belonged and in which he was distinguished, the clients that he faithfully served, and the courts to which he gave the benefit of his ripe learning and scholarly attainments, that feel his loss. The resolutions of the bar, which you present, contain but a truthful tribute to his sincerity and devotion as a friend, to his general worth, to his nobility of soul, and to his bright and cultivated intellect.

Gentlemen, let us practice in our social relations that true sincerity which ever characterized his social life; let us emulate in our professional relations that industry and true devotion to the cause of his client which was his habit, and if it be the decree of Providence that our years shall be as his, let us remember and practice the marked characteristics of our friend and brother in the last years of his life. Then, when denied even the power of locomotion when he was a sufferer, the subject of disease and pain, when he was the head of a family whose education, whose sustenance, whose all depended upon his labor, he was still eminently cheerful. Clothed with all of these responsibilities, and the subject of these afflictions, yet his mind was still clear, his will still controlling, his spirits still buoyant and bright; in fact, to those who knew him well for the past year he seemed to be the simple incarnation of something spiritual—to be possessed of something beyond and above the ordinary elements that appertain to humanity, as neither age nor pain, nor responsibilities of the gravest character, could repress his spirits or cause a shadow of sadness or despondency to cross his brow. Let us emulate his virtues and profit by the rich legacy he has left us.

It is the order of the court that the resolutions of the bar be spread upon the record; that a copy of the same be forwarded to the family of the deceased, and that a copy of the proceedings upon this occasion be furnished the reporter for insertion in the next volume of the reports of this court. It is further ordered, in respect to the memory of the deceased, that no business be transacted by this court during this day, and that the court adjourn until 9 o'clock to-morrow morning.

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NOTE.—The head notes in each case were prepared by the judge who delivered the opinion.

ERRATA.

For "Act of 1825, Chapter 45," on page 172, read, "Act 1845, Chapter 47."

For "cause," in 9th line, on page 46, read, "clause."

For "change," in 3d line of Head Note No. 5, on page 86, read, "charge."

For "Section 20, Chapter 4," on page 288, read, "Section 50, Chapter 4."

For "that" in 1st line, page 525, read, "than."

For "constituted," on page 541, read, "constructed."

For "confirmed," on page 547, read, "conferred."

For "Section 54," on page 572, read, "Section 51."

For "Thomp. Dig., 37," on page 675, read, "Thomp. Dig., 351, §3."

For "supplemented," in 8th line of Head Note No. 7, on page 709, read, "supplemental."

For "$572,000," on page 710, read, "$472,000."

For "her lessee's assignor," on page 771, read, "her lessor's assignor."

For "1872," on page 779, read, "1852."

For "Chapter 934," on page 814, read, "Chapter 734."

Omit the last "and" in reading 4th line of Head Note No. 4, on page 830.

DECISIONS

OF THE

Supreme Court of Florida,

AT A

SPECIAL TERM,

CONVENED DECEMBER 12, 1876.

THE STATE OF FLORIDA, EX REL. GEORGE F. DREW, VS. SAMUEL B. MCLIN, SECRETARY OF STATE, CLAYTON A. COWGILL, COMPTROLLER, AND WILLIAM ARCHER COCKE, ATTORNEY-GENERAL, CONSTITUTING THE BOARD OF STATE CANVASSERS.

1. Whenever a vote cast at an election was legally cast, or whether an election held on the day appointed of which due returnis made to the Board of State Canvassers was a legal election, are judicial questions which the Board of State Canvassers of elections cannot determine. The general power and duty of this Board is to ascertain and declare who received the majority of votes cast. This is a ministerial duty, and its exercise may be controlled by mandamus.
2. The words "true vote," in the statute governing the Board, mean the actual vote cast as distinct from the strictly legal vote. Where a return is so irregular, false, or fraudulent that the Board is unable to determine the actual vote cast, the entire return, under the statute, should be rejected. While this power to determine the falsity or irregularity is something more than simply counting or computing, still such power necessarily appertains to the discharge of every ministerial duty of this character.
3. Where acts admitted to be done by the answer of respondents in a proceeding by mandamus disclose erroneous action and a failure to discharge a ministerial duty imposed by law, and a consequent violation of right, this court has power to order a Board of State Canvassers to reassemble and discharge their duty.
4. There is strictly no return to a peremptory writ of mandamus. It is to be obeyed. A certificate showing in general terms a performance of the several specific acts commanded to be done, is the proper rsponse

to such writs. All other matter is surplusage and should be stricken out.

5. Under the statute, the proper and only place for the filing of the original certificate of a canvass by the Board of State Canvassers of the votes cast at a general election for Governor in this State, is the office of the Secretary of State. Where such an original certificate is filed in this court as a response to a peremptory writ commanding a canvass, this court should direct its return to its only proper legal place of deposit. While it is the duty of this court to compel the Board of State Canvassers to perform their duties, still the canvass made by them under our order is their canvass. This court is not a Board of State Canvassers.

6. Where, in a proceeding by mandamus, the question of the jurisdiction of the court has been heard and determined, a protest against the jurisdiction interpolated in the certificate of obedience to the peremptory writ should be stricken out. Having determined that we have jurisdiction, it is our duty to enforce our order, and that question cannot be thus again raised.

7. Where a canvass for votes cast for persons at an election for the office of Governor of this State is commanded by a peremptory writ, a response showing a canvass of votes cast for other officers is surplusage, which the court of its own motion should strike out.

Statement of the Case.

The relator, on the 13th day of December, 1876, filed a petition praying that a writ of mandamus should issue against S. B. McLin, Secretary of State, C. A. Cowgill, Comptroller, and W. A. Cocke, Attorney-General, composing the Board of State Canvassers, and entered a motion for an order that an alternative writ of mandamus issue in accordance with the prayer of the petition, and an order was made by the Court directing that an alternative writ issue accordingly, returnable December 14th, 1876, at eleven o'clock, a. m., and thereupon the following writ was issued:

THE STATE OF FLORIDA TO SAMUEL B. MCLIN, SECRETARY OF STATE, WILLIAM A. COCKE, Attorney-General, and CLAYTON A. COWGILL, Comptroller, members of the Board of Canvassers of Florida, and to every of them—GREETING:

WHEREAS, It has been suggested to us by the petition of

George F. Drew that a general election was held on the 7th day of November, A. D. 1876, in the several counties of this State, for the election of Governor of the State, and Lieutenant-Governor thereof, and for members of the Assembly for all the counties of the State and for Senators from the several odd numbered Senatorial districts of the State, said election being held in pursuance of law and of proclamation, duly made by the Secretary of State; that at said election, the petitioner, George F. Drew, who was and is eligible and qualified to hold the office of Governor of said State, was a candidate to be voted for by the voters of said State to fill said office, and that besides himself, one Marcellus L. Stearns was a candidate for said office, and that other than himself and said Stearns there was no candidate or candidates voted for to fill the same; that by the returns of the said election received at the office of the Secretary of State, and now on file in said office, the whole number of votes cast at said election for said George F. Drew were twenty-four thousand six hundred and thirteen (24,613) votes, and the whole number of votes cast for said Stearns were twenty-four thousaud one hundred and sixteen (24,116) votes; that in pursuance of law, Samuel B. McLin, Secretary of State, William Archer Cocke, Attorney-General, and C. A. Cowgill, Comptroller, constituting the Board of State Canvassers of Elections, assembled, convened and organized as such Board, at the office of the Secretary of State, on the 27th day of November, A. D. 1876, to canvass the vote of said State given at the said election for Electors of President and Vice-President of the United States, and for Governor and Lieutenant-Governor of Florida, and for members of the Congress of the United States, and members of the Legislature of Florida; that on their said organization of said Board they proceeded to canvass and count the vote cast at the said election for Electors of President and Vice-President; that in the making of such canvass and count of the electoral vote, as the said George F. Drew is informed and believes and avers, the said Board undertook to exercise, and did exercise and usurp judicial functions and powers in this: that they went behind the face of the election returns from divers counties of the State, and did, upon certain affidavits, or pretended affidavits, and upon other pretended evidence, discard the vote

of the county of Manatee, and did refuse to canvass and count and enumerate the votes of the counties of Jackson, Hamilton and Monroe, as shown by the returns of and from said counties of said election, and that they determined to pursue, and have pursued the same course in the canvass and count which they pretend to have made of the votes cast at said election for the office of Governor and Lieutenant-Governor and members of the Legislature, and have refused to count the entire vote of the county of Manatee as shown by the returns from said county to have been cast in said county for said officers; and have refused to canvass and count the votes of the counties of Jackson, Hamilton and Monroe, as shown by the returns from said counties to have been cast at said election for said officers; and that said Board, as said George F. Drew is advised, have and can exercise no judicial functions or powers under the Constitution of this State, or at most only *quasi* judicial powers, in the discharge of their duties as a Board of State Canvassers of Elections, and that it is and was their duty to examine the papers received by the Secretary of State, and purporting to be election returns of said election, and after ascertaining that they appear to be genuine, to declare the result of said election as shown by said returns; that the said Board of State Canvassers, or a majority of them, pretend that they have already concluded, completed and performed, the canvass of the said votes cast at the said election for Governor and Lieutenant-Governor and members of the Legislature, which the said George F. Drew denies, and avers that the contrary of is true: that they have not, as the law requires, canvassed and counted and enumerated the votes cast at said election in the counties of Jackson, Manatee, Hamilton and Monroe, that their said pretended canvass of the returns from said counties, if any such has been made, which he does not admit, is a nullity, as is their said pretended canvass of the returns of the votes of the several counties of the State cast at said election for said officers; that by reason of the failure and refusal of the said Board to canvass and count and enumerate all the votes of all the counties of the State cast at said election for the said office of Governor, on file in the office of said Secretary of State, and upon the completion of the said canvass and count and enu-

meration, to do further, as required of them by law in such case made and provided, the said Drew is prevented from receiving the certificate to which he is entitled certifying that he has been elected to said office; that by the failure of said Board to canvass and count and enumerate the votes of the said counties of Jackson, Hamilton, Manatee and Monroe, as shown by the returns of said election on file in said office of the Secretary of State, they have made it to appear that said Stearns has been elected to said office of Governor; whereas, if they had canvassed and counted and enumerated the said returns of the votes cast in said counties, together with like returns from the other counties of the State, it would manifestly have appeared, and would manifestly appear, that the said Drew was and has been elected to the said office; that returns have been received of the said election at the office of the Secretary of State from the several counties of the State wherein elections have been and were held on said 7th day of November for the election of Governor and Lieutenant-Governor and members of the Legislature, and that it is the duty of the said Secretary of State, and said Attorney-General, and the said Comptroller, to meet at the office of the Secretary of State, and proceed to canvass the returns of the said election, and determine and declare who has been elected to the said office of Governor of said State as shown by the said returns; that the said State Canvassing Board, in canvassing the return from the County of Jackson, went behind the return of the County Canvassing Board of said County and threw out the Campbellton precinct vote where the said George F. Drew received two hundred and fourteen majority of the votes cast at said precinct, and they threw out the whole vote of Friendship Church precinct in said county where the said Drew received one hundred and one majority of the whole vote cast at said precinct; that the said Board went behind the return from the county of Monroe and threw out the entire vote of one precinct in said county, to-wit: precinct known as number three (3), at which said Drew received a majority of three hundred and forty-two votes (342) of the entire vote cast there; said Board refused to canvass and count the return from the county of Manatee, in which county, as shown by the said returns, the said George F. Drew re-

ceived a majority of two hundred and thirty-six (236) votes of the entire vote cast in said county; that said Board went behind the return from Hamilton county and threw out the vote of the precinct in said county that gave the said George F. Drew a majority of one hundred and thirty-eight (138) votes of the whole vote cast there; that the said Board, in throwing out the entire vote cast at said two precincts in Jackson county, and at said one precinct in Monroe county, and at said one precinct in Hamilton county, claimed the right to act, and did act upon *ex-parte* affidavits to impeach the returns from said counties; that said Drew alleges that said Board, in making their said pretended canvass of the returns from the said counties of Jackson, Hamilton, Monroe and Manatee, exceeded their powers, and that they should have confined their canvass of said returns to what was shown or appeared on the face of said returns, the same not appearing to be unintelligible or fraudulent, but genuine and *bona fide;* that said Samuel B. McLin, Secretary of State, and William Archer Cocke, Attorney-General, and Clayton A. Cowgill, Comptroller, have failed and refused to meet and convene and re-assemble as a Board of State Canvassers and canvass and count all the election returns on file in said office of said Secretary of the said election for the office of Governor, held on the 7th day of November, 1876, from each and every of the counties in this State wherein an election was held for said office, and especially have they failed and refused to canvass and count such election returns from the said counties of Jackson, Hamilton, Manatee and Monroe, and have refused to determine from a canvass and count and enumeration of all the votes cast for the said office of Governor at said election in all the counties of the State, as shown by said election returns received at the office of the Secretary of State, who has been elected by the highest number of votes to said office as shown by said returns, and as such Board to make and sign a certificate as required by law containing in words written at full length the whole number of votes cast at said election as shown by the said returns for the said office of Governor of said State of Florida, and the number given for each person voted for for said office, and in and by such certificate declare the result of said election for Governor of said State; that by reason of

said failure and refusal of said Samuel B. McLin, Secretary of State, said William Archer Cocke, Attorney-General, and said Clayton A. Cowgill, Comptroller, the Board of State Canvassers aforesaid, the said Drew has been prevented, and is prevented, from receiving and obtaining from the said Secretary of State the certificate which is made by law *prima facie* evidence of his election to said office, and to which by law he is entitled; that said George F. Drew, the petitioner, is entirely without remedy in the premises, unless it be afforded by the interposition of this court through writ of mandamus:

AND WHEREAS, The said George F. Drew prays that the writ of mandamus may be issued by the court and directed to the said Samuel B. McLin, Secretary of State, the said William Archer Cocke, Attorney-General, and the said Clayton A. Cowgill, Comptroller, commanding them forthwith to meet and convene and re-assemble as a Board of State Canvassers in the office of the Secretary of State, to canvass and count all the election returns on file in said office of said Secretary of State of the election for the office of Governor held on the 7th day of November, 1876; and that as such Board of State Canvassers, to canvass and count the election returns for the said office from each and every of the counties of this State wherein an election was held for said office; and, especially, to canvass and count the said election returns from the said counties of Jackson, Hamilton, Manatee, and Monroe, and to determine from a canvass and count and enumeration of all the votes cast for the said office of Governor at said election in all the counties of the State, as shown by the election returns of said election as received at the office of the Secretary of State, who has been elected by the highest number of votes to the said office of Governor as shown by said returns; and commanding them that they do as such Board make and sign a certificate as required by law, containing in words written at full length the whole number of votes given at said election as shown by said returns for the said office of Governor of the State of Florida, and the number of votes given for each person voted for for said office, and in said certificate declare the result of said election for Governor of said State; and praying that such other order may be had in the premises as justice may require:

Now, therefore, we being willing that full and speedy justice should be done in the premises, do command you, Samuel B. McLin, Secretary of State, and you, William Archer Cocke, Attorney-General, and you, Clayton A. Cowgill, Comptroller, that you forthwith meet, and convene, and re-assemble as a Board of State Canvassers in the office of Secretary of State, to canvass and count all the election returns on file in the said office of the Secretary of State, of the said election for the office of Governor held on the 7th day of November, A. D. 1876, and that as such Board of State Canvassers you canvass and count the election returns for the said office from each and every of the counties of this State wherein an election was held for said office, and, especially, that you do canvass and count the election returns from the said counties of Jackson, Hamilton, Manatee, and Monroe, and that you do determine from a canvass and count and enumeration and tabulation of all the votes cast for the said office of Governor at said election in all the counties of the State, as shown by the election returns of said election received at the office of the Secretary of State, who has been elected by the highest number of votes to the said office of Governor as shown by said returns, and that you do as such Board make and sign a certificate as required by law, containing in words and figures written at full length, the whole number of votes given at said election as shown by the said returns for the said office of Governor of the State of Florida, and the number of votes given for each person voted for for said office, and in said certificate declare the result of the said election for Governor of said State, or that you show cause why you have not done so before our Supreme Court at the Capitol in Tallahassee at 11 o'clock a. m. on the 14th day of December, A. D. 1876, and have you then there this writ.

Witness the Hon. E. M. Randall, Chief-Justice of the Supreme Court of Florida, at Tallahassee, this 13th day of December, A. D. 1876, and the seal of said court.

FRED. T. MYERS,
Clerk of the Supreme Court of Florida.

This writ having, on the 14th day of December, been returned duly served, the Court ordered that the issues be made up by the 16th day of December. On the last named

day, the respondents, McLin and Cowgill, filed an answer, and the respondent, Cocke, a separate answer.

The answer of McLin and Cowgill is as follows:

IN THE SUPREME COURT OF THE STATE OF FLORIDA—SPECIAL TERM, DECEMBER, 1876.

In the matter of the petition of George F. Drew for and the alternate writ of mandamus commanding Samuel B. McLin, Secretary of State, William A. Cocke, Attorney-General, and Clayton A. Cowgill, Comptroller, members of the Board of Canvassers of Florida, to reassemble as a Board of State Canvassers and count all the election returns on file in said office in said Secretary of State of election for the office of Governor, held on the 7th day of November, 1876, and that as such Board of State Canvassers they do canvass and count the election returns for said office from each and every of the counties of this State, wherein an election was held for said office, and especially that they do canvass and count the said election returns from the said counties of Jackson, Hamilton, Manatee, and Monroe; and that they do determine, from a canvass and count and enumeration of all the votes cast for the said office of Governor at said election in all the counties of the State, as shown by the election returns of said election as recorded at the office of the Secretary of State, who has been elected by the highest number of votes to the office of Governor as shown by said returns; and that they do as such Board make and sign a certificate as required by law:

To the Honorable the Supreme Court of the State of Florida:

The said Samuel B. McLin and Clayton A. Cowgill ask leave to say that they protest and aver now at all times that this honorable court has no jurisdiction in the premises as set forth in the alternate writ issued in this matter, and cannot grant what the petitioner therein prays for and which said alternate writ commands to be done, unless good reasons are shown why they should not be called upon to act as commanded.

But for answer thereunto, or to so much thereof as is necessary to answer unto, the said Samuel B. McLin and Clay-

ton A. Cowgill, two of the respondents in said matter, for themselves jointly and severally, pray leave to say:

That they admit that there was an election held on the 7th day of November, 1876, as set forth in said alternate writ, and that the persons to be voted for at said election were as therein set forth. And they further admit that the said George F. Drew was eligible as alleged, and that there were no other candidates for the office of Governor except the said George F. Drew and Marcellus L. Stearns as alleged; but that, according to the best recollection of these respondents, there were two or three scattering votes cast at said election for persons other than those hereinbefore named as candidates for the office of Governor.

But they deny that, as appears by the returns of the said election received at, and on file in, the office of the Secretary of State, that the true vote cast at said election for George F. Drew was twenty-four thousand six hundred and thirteen (24,613), and that the true vote cast for said Marcellus L. Stearns was twenty-four thousand one hundred and sixteen (24,116).

And these respondents, further answering, say that they, with the said William Archer Cocke, did convene and organize as a Board of State Canvassers at the office of the Secretary of State on the said twenty-seventh day of November, 1876, and did proceed to canvass the returns from all the counties in which an election had been held, and continued said canvass until the said Board had canvassed and passed upon returns from all the counties in said State, and did ascertain from such canvass of the returns from all the counties in said State the true vote cast at said election for each and every of the persons voted for at said election, and did declare the result thereof and certify the same as required by the law providing for the holding and conduct of said election, as required by the law of said State as enacted in 1868, and as finally amended in 1872, which said law was in force at the time of and during the holding and conduct of said election, and is still in force now and at the time of the filing of the petition and the issuance of the writ herein now being answered unto.

And that said canvass of the said several returns was fully completed and ended on the early morning, to wit: at the hour of about half-past one o'clock of the sixth day of

December, 1876, and the said Board by its unanimous vote so declared; and that nothing remained to be done thereafter to complete the entire labors of said Board but the preparations of the proper certificate of the result thereof as had been ascertained, and the preparation of which certificate the Board unanimously directed its clerk to prepare, which was thereafter done and signed by these respondents and duly filed in the office of the Secretary of State, these respondents constituting a majority of said Board. That said Board then adjourned without day.

And these respondents, further answering, say that they deny that in the canvass aforesaid, in the ascertainment of the result of said election, in making up and certifying to the same as required by said law of 1868, they were guilty of any usurpation whatever.

And these respondents, further answering, say that in relation to the said county of Manatee, it appeared from the return of said county and from evidence received by said Board, that the said return was so irregular and false and fraudulent that said Board was unable to determine the true vote for any officer or member voted for at said election, and said Board so certified, and they did not include such return in their determination and declaration in the said certificate of the result of said election hereinbefore referred to.

And these respondents, further answering, say that as to the counties of Jackson, Hamilton and Monroe, it was shown by evidence that the returns therefrom were severally false and fraudulent, and that the Board determined from the evidence, with reference to each of said counties, what the true vote therein was for each officer and member voted for at such election, and the result of such determination was acted upon in declaring the result of said election and certifying thereto as aforesaid.

And these respondents, further answering, say that in the action that was had by said Board as aforesaid as to the counties of Hamilton and Monroe, the vote of said Board was unanimous, and in the action in relation to Jackson county the action was by a majority of said Board.

And further, that as to the said counties, Manatee, Jackson, Hamilton and Monroe, showing was made and evidence

received from both parties, and unanimously acted upon by said Board.

And these respondents, further answering, say that as to that part of the suggestion as contained in said writ, that said Drew is entirely without remedy, except through the intervention of this Honorable Court by its writ of mandamus, they respectfully submit that each and every of the officers and members voted for at such election have full, perfect and ample remedy; the former through the courts of law by relation in the nature of *quo warranto*, and the latter by and through the respective branches of the Legislature to which they make claim to have been duly and legally elected; and that any action which might be ordered by this Honorable Court through the writ prayed for would have no legal effect upon either forum, who might, in the pursuit of the proper remedy, be called upon to act.

And these respondents further respectfully submit to this Honorable Court, that said Board having canvassed all the returns from all the counties in said State, in which an election was held on the said 7th day of November, and determined and declared who had been elected to any office or member by the true vote cast at said election, and made and signed the certificate required by law in such case made and provided, and adjourned without day, that its powers as a Board ceased. SAMUEL B. McLIN,
Secretary of State.
C. A. COWGILL,
Comptroller.

Sworn to and subscribed before me this 16th day of December, A. D. 1876. FRED. T. MYERS,
Clerk of the Supreme Court of Florida.

J. P. C. EMMONS, *of Counsel for Respondents.*

The answer of Attorney-General Cocke is as follows:

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

The State of Florida ex rel. George F. Drew, vs. Samuel B. McLin, Secretary of State, C. A. Cowgill, Comptroller of Public Accounts, and Wm. Archer Cocke, Attorney-General for the State of Florida.

The separate answer of Wm. Archer Cocke to an application before the Supreme Court of the State of Florida for

a writ of mandamus against the said S. B. McLin, C. A. Cowgill, and your respondent, the said William Archer Cocke, filed by George F. Drew and others:

The said respondent answers and says that he neither denies nor assents to the statements of law set forth in the said paper asking the intervention of the writ of mandamus against the members of said Canvassing Board. Your respondent further states that the charge of rejecting the votes of Manatee, Hamilton, Monroe and Jackson counties is not applicable to him in the conducting the canvass for the election of State officers, which occurred in this State on the 7th of November ultimo.

He further states, it was his opinion that the votes in the counties aforesaid should have been counted, and he so indicated by his vote as a member of the State Canvassing Board.

This respondent, further answering, disclaims that he has usurped power as a member of said Board, or advised others so to do. But in relation to the allegations in the petition for a mandamus, to the contrary notwithstanding, he avers that he has followed the law in all respects, and submits the questions of law involved in this case to the Honorable Court.

WM. ARCHER COCKE,
Attorney-General and ex-officio member of the State Canvassing Board of Florida.

The relator then moved to strike out the answer of the respondents, McLin and Cowgill, because the same is evasive, argumentative and uncertain and insufficient, and does not state facts so that a judgment of the Court can be had thereon.

Afterwards the following order was made by the Court on the 16th of December:

The motion to strike from the files the answer of the respondents, Cowgill and McLin, having been argued and submitted, it is considered by the Court that as to the rejection by the respondents, as State Canvassers, of the election returns or the papers purporting to be returns from any county, the answer be amended so as to set forth and show the specific causes and grounds for such rejection, and the

defects existing in such returns; and also, that as to the rejection by the said respondents, as such Canvassers, of any portion of the votes included in any return from any county, the answer be amended so as to set forth the specific causes and grounds of such rejection in each and every of the instances of such rejection; and that the amendments be made and filed by Monday, the 18th instant, at 12 o'clock at noon.

On the day last named, the respondents, Cowgill and McLin, filed an amended return, which is as follows:

IN SUPREME COURT, SPECIAL TERM, DECEMBER, 1876.

George F. Drew *vs.* Samuel B. McLin *et al.*—Mandamus.

And these respondents, the said McLin and Cowgill, in compliance with the order of this Honorable Court, make these amendments to the return filed to the alternate writ of mandamus issued herein:

And say, that said Board did not include the return from said county of Manatee in its determination and declaration of the vote cast at said election, upon the ground of irregularity and fraud in the conduct of the election on said 7th day of November, 1876.

And these respondents further say: That in the county of Clay twenty-nine votes were added to the vote cast for George F. Drew, and six votes were added to the vote cast for Marcellus L. Stearns, upon the ground that said votes had been improperly rejected by the County Canvassers of the vote of said county at said election.

And further, in relation to said county of Clay: That four votes cast for George F. Drew at said election were deducted, and two votes cast for Marcellus L. Stearns were deducted, upon the ground that said votes were cast by non-residents of the county.

And these respondents further say: That in relation to the county of Hamilton, the vote of precinct No. 2 was deducted from the vote cast in said county as appeared from the returns upon the ground of gross violation of the election law, and fraud in the conduct of the election.

These respondents further say: That five votes were deducted from the vote cast in Hernando county, as appeared

from the returns therefrom, upon the ground that said votes were illegally cast.

And these respondents further say that 557 votes were deducted from the vote cast in the county of Jackson, as appeared from the face of the return, upon the ground of irregularity and gross fraud in the conduct of the election.

These respondents further say: That two votes were deducted from the vote cast in Leon county, as apparent upon the face of the return, upon the ground that said votes were illegal.

And these respondents further say: That the Board deducted from the vote cast in the county of Jefferson, as appeared from the return, 61 votes, upon the ground that said 61 votes were fraudulently cast.

And these respondents further say: That seven votes were deducted from the vote cast in the county of Orange, upon the ground that said votes were illegally cast.

And these respondents further say: That the vote of one precinct in the county of Monroe was deducted from the vote, as appeared from the return from said county, upon the ground of irregularity in the conduct of the election, and fraud in the conduct of the inspectors of said election in said precinct.

And these respondents further answering say, as to the said county of Manatee: that said Board did not include the vote cast in said county as it appeared on the face of the return, upon the ground that it appeared in evidence that there was such irregularity and fraud in the conduct of the election in said county in receiving votes of persons not registered, and there being no registration list furnished inspectors, and no designation of voting places, and no notice of election, that said Board could not ascertain the true vote.

SAMUEL B. McLIN,
C. A. COWGILL.

Sworn to and subscribed before me this 18th day of December, A. D. 1876.

W. M. McINTOSH,
Notary Public for Leon County.

J. P. C. EMMONS, *of Counsel for Respondents.*

And upon the same day the relator filed the following

demurrer to the answer of the respondents, McLin and Cowgill:

SUPREME COURT OF FLORIDA, DECEMBER, SPECIAL TERM, A. D. 1876.

State of Florida *ex rel.* George F. Drew *vs.* Samuel B. McLin *et als.*—Mandamus.

The relator, George F. Drew, demurs to the answer of the respondents, McLin and Cowgill, as amended, on the ground that the same is insufficient in law.

Points of Demurrer:

1st. The Board of State Canvassers could not lawfully exclude or reject county return or votes from the county of Manatee, or the precinct returns or votes from the other counties, stated in the answer to have been excluded or rejected, upon the grounds stated in said return of answer; nor could they legally make any addition of votes to any returns as stated in said answer.

2d. The said answer shows that said Board illegally excluded the return from the county of Manatee, and made the additions to and deductions from the votes as they appear by the returns from the other counties mentioned in their said answer.

3d. The adjournment of the Board before having made a legal canvass of the votes of the several counties as shown by the returns therefrom, is no reason in law why they should not re-assemble and canvass the votes of the several counties as they appear upon the face of the returns.

4th. The allegation in the said answer that each of the officers and members voted for at said election has his remedy as therein stated, is no sufficient reason in law why the relator should not have his remedy in the premises by mandamus.

R. L. CAMPBELL,
R. B. HILTON,
GEO. P. RANEY,
For Relator.

We certify that the above demurrer is, in our opinion, well founded in law, and we further say it is not interposed for delay.

R. L. CAMPBELL,
R. B. HILTON,
GEO. P. RANEY.

December 18, 1876.

The respondents, McLin and Cowgill, filed the following joinder in the demurrer:

Respondents join in demurrer.

J. P. C. EMMONS,
Counsel for Respondents.

The section of the statute defining the powers and duties of the Board of Canvassers is as follows:

SEC. 4. On the thirty-fifth day after the holding of any general or special election for any State officer, member of the Legislature, or Representative in Congress, or sooner if the returns shall have been received from the several counties wherein elections shall have been held, the Secretary of State, Attorney-General, and the Comptroller of Public Accounts, or any two of them, together with any other member of the Cabinet who may be designated by them, shall meet at the office of the Secretary of State pursuant to notice to be given by the Secretary of State, and form a Board of State Canvassers, and proceed to canvass the returns of said election, and determine and declare who shall have been elected to any such office, or as such member, as shown by such returns. If any such returns shall be shown or shall appear to be so irregular, false or fraudulent that the Board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration; and the Secretary of State shall preserve and file in his office all such returns, together with such other documents and papers as may have been received by him or by said Board of Canvassers. The said Board shall make and sign a certificate, containing, in words written at full length, the whole number of votes given for each office, the number of votes given for each person for each office, and for member of the Legislature, and therein declare the result, which certificate shall be recorded in the office of the Secretary of State in a book to be kept for that purpose; and the Secretary of State shall cause a certified copy of such certificate to be published once in one or more newspapers printed at the seat of government. Chap. 1868, Laws of Florida.

R. L. Campbell, R. B. Hilton, and *Geo. P. Raney, Eqrs.,* for the Relator.

Brief of *Mr. R. L. Campbell:*

The respondents are, under the act of 27th February, 1872, purely ministerial officers, possessing no discretionary power beyond what may be required to determine whether the returns of the County Canvassers are authentic, regular, and intelligible. Bloxham vs. State Canvassers, 13 Fla., 55; Cooley Con. Lim., 621; O'Ferrel vs. Colby, 2 Maine, 180; Mays vs. Freeland, 10 Mo., 630; Atty. Genl. vs. Sturs, 44 Mo., 223; Bland vs. Rodman, 43 Mo., 257; Atty. Genl. vs. Barstow,4 Wis.,749; Bacon vs. York Co., 26 Maine, 491; Taylor vs. Taylor, 10 Maine, 107; State vs. Cann, 10 Iowa, 343; People vs. Vancleve, 1 Mich., 362; Kisler vs. Cameron, 39 Ind., 488.

The canvass made by respondents, as set forth in their answer to the alternative writ, was not the discharge of ministerial duty, but the exercise of judicial functions. Authorities above cited.

No authority can be derived from the act of 1872 for the exercise of such functions by the respondents; for either it must be so construed as to avoid a conflict with 1 Sec. VI. Art. of the State Constitution, (Cooley Con. Lim., 184, Ogden vs. Sanders, 12 Wheat., 270,) or it must be declared void because of such conflict.

This is the appropriate remedy to compel respondents to perform the ministerial duty of ascertaining the vote from all the returns, there being no question as to their authenticity, regularity, and intelligibility. Bloxham vs State Canvassers, 13 Fla., 55; People vs. Rivers, 27 Ill., 243; O'Ferrel vs. Colby, 2 Maine, 180; Mays vs. Freeland, 10 Mo., 630.

Brief of *Mr. R. B. Hilton:*

Construction of the Statute.

The concluding words of the first sentence of section 4 are as follows: "Canvass the returns of said election and determine and declare who has been elected as *shown* by the returns." There is no difficulty in deciding that "shown" here means *shown by the returns.* When, in the next sentence, the same words "shown" is employed, and no word or words to signify *how* "shown," what else can be the meaning than, as before, *shown by the returns?* The fact that the word "appear" is also there used is no indication of any other meaning being involved in the word "shown," as used in the second instance, than as employed in the first. If it be answered that the word "appear" here used would indicate whatever is told by the face of the returns, and that the word "shown" must indicate something apart from, and outside of what is exhibited by the "returns," and in addition thereto, the reply is that the word "shown" precedes in the sentence the word "appear," and it cannot be that a more comprehensive term preceding one less so is intended to enlarge the signification of the latter. The defects then in the "returns" covered by the words "irregular, false or fraudulent," must be such defects as are "shown" by or appear from the "returns" themselves.

What is meant by the words "true vote?" Manifestly the *true number of votes* cast and returned. They cannot mean the number of lawful voters who voted, for that is something utterly impossible of determination by the Board. And besides, if that could be determined by them, unless they could further determine, not only the number of legal votes cast, but for whom cast, they would not advance one step towards determining who was elected.

The duty of the Board as prescribed in the concluding sentence seems unmistakably to indicate what has already

been said. The certificate there required of them must set forth in words, written at full length, *the whole number of votes given*—not *legal* votes—they are not permitted to determine, and have no means given them for ascertaining the legality of a single vote, much less "the whole number" of such legal votes.

But the Board can, from the returns, unless they *show* fatal *irregularity,* fraud or falsehood on their face, (which is not pretended,) determine the *true* and actual number of votes cast for the several candidates.

The legality of the votes cast is a question for other tribunals possessing the constitutional power and the requisite machinery for its determination, as the Legislature in each branch manifestly has in the case of its members, and as the Judiciary has in the case of Governor and Lieutenant-Governor on *quo warranto.*

It may be further observed as to the word "shown" used here by the Legislature to indicate what is exhibited by the "returns"—it seems to have obtained an almost special and specific use by courts and law writers when speaking of Canvassing Boards and the bounds and limitations of their powers. Cooley Con. Lim., 621-2-3; Brightley's Election Cases, 305-6; 7 Iowa, 200; 36 Wis., 507.

If, as above stated, the returns be *fatally* defective, what then? *The Board must so certify and not include;* they cannot do something else, such as take testimony, or hear evidence from which to obtain, aside from the returns, the number of legal votes cast. State vs. Martin, 1 S. C., 30.

In the construction of the statute I have endeavored to steer clear of the constitutional difficulty involved in the claim made for the Board to the exercise of judicial powers in taking of testimony, and hearing of evidence, and making a final determination of the rights of parties.

If the statute has undertaken to give them such a tremenduous and far-reaching power, there ought to be something

in its language clearly indicating it. But the power does appear in the language of the statute. If conferred, it is by reasonable implication, not by express grant. State vs. Acting Board, 1 S. C., 30.

"Powers granted by statute cannot be enlarged by implication so as to include powers of an entirely different nature, as for instance judicial powers, where only ministerial are granted." 26 Maine, 569.

The court, if possible, will so construe a statute as to avoid a conflict with the constitution. Dow vs. Norris, 4 N. H., 17; Newland vs. Marsh, 19 Ill., 384.

What is the constitutional inhibition of the powers claimed by, for, and exercised by the Board?

It is found in the division of powers of government into three separate departments, a principle which lies at the very foundation of the American system of free governments and of constitutional liberty wherever it exists.

This division is in no other Constitution with which I am acquainted so carefully guarded, especially in the isolation and separation of the judiciary, as in that of Florida. Article III.; Article VI., Sec. 1, 18; Article V., Sec. 17; Graham vs. Ponder, 4 Fla., 23; Cooley Con. L., 87; Hardenbury vs. Kidd, 10 Cal., 402; Llewellyn vs. Marsh, 36 Ill., 359; Commonwealth vs. Jones, 10 Bush, 725; Chandler vs. Nash, 5 Mich., 409.

What is the nature and character of the right as to which the Board has rendered its judicial decision?

It is the right to the *certificate of election* to the office of Governor.

That certificate, like any other instrument of title, is *property,* and had an intrinsic value. 7 Bush, 453; Bloxham's Case, 13 Fla., 55.

But our Declaration of Rights (8 sec.) says: "No person shall be deprived of life, liberty, or *property,* without due process of law."

By whom is the right to this certificate *adjudged* against George F. Drew and in favor of M. L. Stearns? Not by the judiciary, but by a branch of the administrative department of the government, to wit: three members of Governor Stearns' Cabinet.

But it may be answered that it matters not as regards the relator whether he is deprived of the certificate by a ministerial determination or judicial decision on the part of the Board. Far otherwise; for if the adverse determination is ministerial, it may be controlled, if judicial not. Besides the opportunities for, and dangers of, and temptations to a lawless, wilful, or corrupt determination, are far greater if the Board may go outside of the returns and determine according to their own "sweet wills," and upon such testimony as they may choose to admit, the rights of adverse candidates to office.

And so, as the powers of the Board are enlarged and the danger from its exercise is increased, is all redress, and right of revision of their action, taken away.

They are *inferior* judges, with jurisdiction nevertheless commensurate with the State, deciding issues of the most tremendous import, and yet judges from whose judgments there lies no writ of error or appeal!

Other refuge failing, we are told to betake ourselves to Sec. 6 of Art. IV. of the Constitution: "The Legislature at its first session after the ratification of this Constitution shall by law provide for the registration;" but surely we need go no further. The grant of the transcendent power claimed to have been given to the Board by the Legislature was not by an act of the first session, but of a session long subsequent to the first.

The objection taken that the Board having met, and, as they allege, having completed the canvass, are *functus officio,* and not subject to the pending process, was one of

the questions submitted to the court in the Bloxham case (13 Fla.) and ruled upon. See page 72.

Numerous other decisions to the same effect might be cited, but this court having once expressly determined it, further citations might seem impertinent.

So also as to the plea that the relator has another remedy by *quo warranto.*

In case of Ellis vs. County Commissioners, 2 Gray, 370, the court even granted the mandamus pending a *quo warranto.* And why not? Surely it is no new thing for a party to seek and procure by one suit the evidence necessary to maintain his cause in another.

The attention of the court is especially called to the late South Carolina cases decided within the last few weeks. The language of the South Carolina statute upon which the Supreme Court of that State in the late case of State, *ex rel.* Sims, *et al.,* vs. Board of State Canvassers of Elections, granted a mandamus to the Board of Canvassers, is as follows: "Upon such statements (those of the County Canvassers) they shall proceed to determine and declare what persons have been by the greatest number of votes duly elected to such offices. They shall have power, and it is made their duty, to decide all cases upon protest and contest that may arise, when the power to do so does not by the Constitution reside in some other body." A decision could hardly be more directly in point than that of the South Carolina Supreme Court in this case.

In illustration of various points embraced in this discussion the following citations are made: 27 Ill., 242; 29 Ill., 419; 2 Ind., 423; 9 Ala., 338; 2 Bray, 370; 7 Bush, 453; 10 Bush; 17 Ill., 167; 36 Wis., 498.

In conclusion, I quote the language of the Supreme Court of Wisconsin in the case last cited, only varied a little to adapt it to the case now under consideration:

"A Board of Canvassers of Elections, who illegally and

wantonly disfranchise electors by rejecting their votes, commits a most serious offence, an offence which strikes at the very foundation of our system of government, and which cannot be too seriously censured. He who, by fraud or by wilful disregard of his sworn duty, defeats the will of the people as expressed by their votes, commits a *political crime next to treason, and nearly akin* to it, and this court will never fail, on any proper occasion, to characterize such an offence in befitting terms."

Whether or not the respondents have been guilty of the *great crime* here named is not for me, in this forum, and in these proceedings, to say. But I do say, and the pleadings authorize me to say it, that the will of the people of Florida, as expressed by their votes for Governor of the State, has been defeated by this State Canvassing Board, as far as their action could defeat it.

Brief of *Mr. J. P. C. Emmons* for Respondents:

The State Board in canvassing went behind the *face* of the returns. Relator claims there is no exercise of judgment or discretion to be exercised by said Board.

Statute of 1868 (amendment of 1872) requires of the Board an examination as to the *regularity, false* or *fraudulent* character of the returns. This necessarily contemplates *inquiry;* evidence of some kind must be received and passed upon. If any evidence is to be received, if any judgment or discretion is to be exercised in relation to it, then the evidence would be such as would ordinarily be received in any judicial proceeding, and weighed and applied in like manner.

If this be so, then it is contended by the respondents that mandamus will not lie to control or direct its exercise.

If the Board has *acted* in relation to *all* the duties im-

posed by the statute, this Court will not interfere or review that action in this proceeding.

To sustain this view we cite: Towle vs. State, 3 Florida, 202; People vs. Governor, 29 Mich., 320; People vs. Wayne Co., 1 Mich., 359; Arberry vs. Beaver, 6 Texas, 457; Kendall vs. U. S., 12 Peters, 610; Decatur vs. Paulding, 14 Pet., 509; State vs. Hetzel, 8 Nevada, 309; Clark vs. McKenzie, 7 Bush, 527; 36 Wis., 505. Court say the statute pointed out the duty of the Board in *unmistakable terms*. If the Board did not send for amended returns, the Board were bound by the *returns* by *statute*.

If respondents are correct in construing the statute, and the Board has completed its labors under it, this Court will not call upon it to re-convene; as a Board it is *functus officio*.

The Bloxham case, 13 Fla., 55, is not one in conflict with this view. There it was conceded the Board had not canvassed or acted upon all the returns.

The case in 43 Missouri, 256, State vs. Rodman, is one like the Bloxham case; *all* the returns were not acted upon.

The statute regulated how the vote should be counted.

The cases cited by petitioners are all in favor of our proposition. Wherever the Courts have granted the writ, it has been done where a statute of the State controlled.

If Court should grant the peremptory writ *as asked*, it will call for the counting of the votes cast in Manatee, Hamilton, Jackson and Monroe Counties, as it appears from the *face* of the returns, the Board could not reject either, even though they should appear or were shown to be *forged*.

Under such a statute the Court will not direct the Board *how* to do its duty.

In Hardenburgh et al. vs. Kidd et al., 10 Cal., 402, the Legislature conferred upon the Court of Sessions a *taxing*

power. There was nothing in the Constitution of California which even impliedly conferred upon the judiciary a taxing power. The subject is not even referred to in the judiciary provisions of the Constitution.

In the case, 5 Mich., 409, Chandler vs. Nash, where the act gave to notaries public judicial powers, and authorized such proceedings as were in the nature of concurrent jurisdiction with the established Courts, as recognized by the Constitution, the Court held there was no implied power to vest such officers with any power but purely ministerial, saying notaries were in no way appointed under the Constitution, but created by the statute.

In our Constitution, Art. 14, Secs. 2, 3 and 7, are provisions on the subject, and the Legislature has, under these provisions, provided for an inquiry into any abuse of right as contemplated in these sections.

There is nothing in Cooley, as cited by relator, p. 421, and the authorities there cited, that is opposed to the idea that the statutes shall control. (See p. 325 of 29 Mich., opinion of Cooley as to some *mingling* of powers.)

Sec. 3 of Art. 14 says that a subject of a foreign country, when he offers to vote under this Constitution, shall present certain evidence, otherwise he shall not be permitted to vote.

The Legislature has fixed, under the Constitution, the mode, time and place of conducting and *supervising* elections, and returns, and for a final adjustment of all previous action.

In Pillsbury et al. vs. Aldermen of Charleston, 1 Richardson's New Series, 1868 and 1870, p. 30, the petitioners alleged that relator received the majority of the *legal votes*. In case at bar it does not. But the reliance of petitioner from this case is that the Board went beyond its power; that it must be confined to the express delegation, and not act upon implied power. On page 41, Judge Willard says:

"That portion of the mandate that relates to the declaration of the election must be regarded as fixing the character of proceeding and the issues triable under it." The statute is cited on page 38. They shall *declare the election.*

MR. JUSTICE WESTCOTT delivered the opinion of the court on the demurrer.

The view that the Board of State Canvassers is a tribunal having power strictly judicial, such as is involved in the determination of the legality of a particular vote or election, cannot be sustained. The Constitution of this State (Article III., and Section 1 of Article VI.,) provides that "the powers of the government of the State of Florida shall be divided into three departments: Legislative, Executive and Judicial; and no person properly belonging to one of the departments shall exercise any functions appertaining to either of the others, except in those cases expresssly provided for by this Constitution."

"The Judicial power of the State shall be vested in a Supreme Court, Circuit Court, County Courts, and Justices of the Peace."

All of the acts which this Board can do under the statute must be based upon the returns; and while in some cases the officers composing the Board may, like all ministerial officers of similar character, exclude what purports to be a return for irregularity, still everything they are authorized to do is limited to what is sanctioned by authentic and true returns before them. Their final act and determination must be such as appears from, and is shown by the returns from the several counties to be correct. They have no general power to issue subpœnas, to summon parties, to compel the attendance of witnesses, to grant a trial by jury, or do any act but determine and declare who has been elected as shown by the returns. They are authorized to enter no judgment, and their power is limited by the express words

of the statute, which gives them being, to the signing of a certificate containing the whole number of votes GIVEN for each person for each office, and therein declaring the result *as shown by the returns*. This certificate thus signed is not a judicial judgment, and the determination and declaration which they make is not a judicial declaration—that is, a determination of a right after notice, according to the general law of the land as to the rights of parties, but it is a declaration of a conclusion limited and restricted by the letter of the statute. Such limited declaration and determination by a Board of State Canvassers has been declared by a large majority of the courts to be a ministerial function, power and duty, as distinct from a judicial power and jurisdiction. Indeed, with the exception of the courts in Louisiana, and perhaps another State, no judicial sanction can be found for the view that these officers are judicial in their character, or that they have any discretion, either executive, legislative or judicial, which is not bound and fixed by the returns before them. The duty to count these returns has been enforced by mandamus so repeatedly in the courts of the several States of the Union, that the power of the courts in this respect has long since ceased to be an open question. Mr. Justice Smith, in the very celebrated case of the Attorney-General *ex rel.* Bashford vs. Barstow, (4 Wis., 813,) when speaking of the powers of the Board of State Canvassers, after reciting their power to "determine" the result of an election from the returns, says: "These are not judicial but purely ministerial acts." must, therefore, decide that the general nature of the power given by the statute is ministerial, and that to the extent that any strictly and purely judicial power is granted, such power cannot exist.

This brings us to the consideration of the only remaining general question as to the powers of the Board under the statute.

While the general powers of the Board are thus limited

to and by the returns, still as to these returns the statute provides that "if any such returns shall be shown or shall appear to be so irregular, false or fraudulent that the Board shall be unable to determine the true vote for any officer or member, they shall so certify, and shall not include such return in their determination and declaration; and the Secretary of the State shall preserve and file in his office all such returns, together with such other documents and papers as may have been received by him or by said Board of Canvassers." The words *true vote* here indicate the vote *actually cast,* as distinct from the *legal vote.* This follows, *first,* from the clear general duty of the Canvassers, which is to ascertain and certify the *"votes given"* for each person for each office; and, *second,* because to determine whether a vote cast is a legal vote is beyond the power of this Board. As to the words "irregular, false and fraudulent" in this connection, their definition is not required by the questions raised by the pleadings in this case. These respondents have not alleged that they have before them any return "so irregular, false or fraudulent" that they are unable to determine the actual vote cast in any county as shown by the returns; and nothing can be clearer than that the counting of returns sufficiently regular to ascertain the whole number of votes given, and signing a certificate, are merely ministerial acts. Under these pleadings the genuineness and regularity of the particular returns in question here are admitted. We will say, however, that the clear effect of this clause in the statute is that a return of the character named shall not be included in the determination and declaration of the Board; and that it has power to determine the *bona fide* character of the returns *dehors* their face. It is not within the power of this Board to refuse to count some of the votes embraced in a return and to count others embraced therein. They must count the whole of the return, or must reject it *in toto.* We will also say that the

powers here conferred are ministerial powers. It is true that in some respects these powers are something more than simple counting or computing, but they are powers which necessarily appertain to the discharge of every ministerial duty of this character. Their existence is no obstacle to the control of such officers by mandamus from a court having jurisdiction of the subject-matter.

In defining the duties of a Board of State Canvassers, where there was no like cause to this in the act defining their powers, this court, in 13 Fla., 73, said: "Their duties and functions are mainly ministerial, but are *quasi* judicial, so far as it is their duty to determine whether the papers received by them and purporting to be returns were in fact such, were genuine, intelligible, and substantially authenticated as required by law." The power to ascertain the regularity, the genuineness and the honesty of a return, are powers of like character to those mentioned and thus described in that case.

By the statute of 1868 the duty and power of the Board of State Canvassers was confined exclusively to the compiling of such returns of any election as should come to their hands from the County Canvassing Boards, and upon computation of the aggregate vote, as shown by such returns, to ascertain who had received the highest number of votes for any office, and to certify the result and declare therefrom who was elected to any office.

Under this act it became the duty of the State Board to determine ministerially the result, but necessarily, by the exercise of discretion and judgment, they must first determine that the papers before them were genuine, and that they were executed in form and matter substantially according to the requirements of the statute, and that they were, in fact and in law, the returns of the election. This, as was said by this court in a former case, was the exercise of a *quasi* judicial power. To the extent here indicated, a

judgment in the nature of a judicial function is necessarily exercised, for if it be otherwise, the whole law is inoperative in respect to the power of the Board to do any act whatever. The Constitutional provision that the officers of one department of the government are strictly forbidden to do any act, or to exercise any function pertaining to any other department, unless expressly provided for in the Constitution, must be taken in connection with the provision (Section 5, Article XIV.,) authorizing and requiring the Legislature to provide for ascertaining the result from "the returns of elections." This is clearly an express authority for providing that "returns of elections" must be received, considered and passed upon by such officers or persons as might be designated by the Legislature. And the necessary conclusion is that such officers may be authorized by the Legislature to inquire into the truth or falsity of the returns sent to them, and if, upon such inquiry, they be satisfied that the return does not show the vote actually cast at the election, but that it states a falsehood as to that fact, they may lay it aside and refuse to count the return as is provided in the act of 1872.

"If, as is here alleged by the relator, the respondents neglected to examine and include returns duly and legally made from several of the counties, and, therefore, but partially performed what they were by law required to do, it must be considered that they have not complied with the law, and they must be required to do so by means of the process here invoked." This leads to a careful examination of the pleadings herein made.

The case is before us upon a demurrer to the return of the respondents to the alternative writ. The alternative writ sets up the counting and computing by the Canvassers of the votes given as shown by the returns from certain counties named. It alleges that returns of said election from the several counties of the State, wherein elections have

been and were held on the 7th day of November for the election of Governor, have been received at the office of the Secretary of State; that there has been a pretended canvass of such returns, and that as to the counties of Jackson, Hamilton, Monroe and Manatee, the said Canvassers have not confined themselves to a canvass of the returns from said counties, although the same were not unintelligible or fraudulent, but genuine and *bona fide*. The relator then prays direction to such Board of State Canvassers that they do canvass and count the election returns for the office of Governor from each and every of the counties of the State wherein an election was held for said office, and that they do canvass and count the said election returns from the said counties of Jackson, Hamilton, Manatee and Monroe. The writ then proceeds in the usual and proper form, which it is not necessary here to insert. The issues presented by the answers, original and amended, are special and precise, setting up in each case where the returns from any of the said counties were not counted and computed, the particular reason and cause for such action by the Board. The question arising upon the demurrer is, do these answers show sufficient cause in law why the peremptory writ should not be awarded? We examine each of the reasons assigned in the answer as to the several counties, being guided and controlled in our conclusion by our views of the powers of the Board as hereinbefore defined.

As to the County of Jackson:

The answer sets up that five hundred and fifty-seven (557) votes were deducted from the votes cast in the county of Jackson, as appeared from the face of the return, upon the ground of irregularity and gross fraud in the conduct of the election.

Upon the face of this answer, and in view of the express allegations of the alternative writ as to the genuineness,

intelligibility and *bona fide* character of the return of the votes cast, the only question raised here is whether, under this statute, the Canvassers can reject a return of the votes cast, or any of the votes cast, for irregularity or fraud in the conduct of the election.

Whether irregularities or fraud in an election will authorize the rejection of a vote cast, counted and returned in a genuine, *bona fide* return, is a question of law not within the power of this Board to determine. If the return was regular, genuine and *bona fide,* as it was admitted to be by the pleadings, it was the duty of the Board to count it.

As to the County of Hamilton:

The answer alleges that there was a deduction made from the votes cast at one precinct, as appeared from the face of the return, upon the ground of gross violation of the election law and fraud in the conduct of the election. What has been said as to Jackson county covers this case, and there is no necessity for repetition.

As to the County of Monroe:

The answer alleges that the vote of one precinct was deducted from the vote as appeared from the return from said county, upon the ground of irregularity in the conduct of the election and fraud in the conduct of the inspectors of said election at said precinct. What has been said covers the matter of irregularity in the election. As to fraud in the conduct of inspectors at a precinct, it is not a ground upon which the Canvassers can reject a return from the county which is genuine and *bona fide.* What is fraud in such an inspector is a question of law; so also the question whether such fraud by inspectors can vitiate an election is a question of law. Both are judicial questions beyond the power of the Board to determine.

As to the County of Manatee:

The answer sets up that said Board did not include the return from said county of Manatee in its determination and declaration of the vote cast at said election, upon the ground of irregularity and fraud in the conduct of the election on said 7th day of November, 1876. The matter of irregularity and fraud here alleged has already been considered in the case of other counties.

The answer alleges further as to this county, that the Board did not include the vote cast therein, as it appeared on the face of the return, because it appeared in evidence that there was such irregularity and fraud in the conduct of the election in said county in receiving votes of persons not registered, and there being no registration list furnished inspectors, and no designation of voting places, and no notice of election, that said Board could not ascertain the true vote.

A return of *votes cast* in a county at a general election, of which notice is given throughout the State by the proper executive authority, no notice of election by local officers (county) having been given, is not a return either irregular, false, or fraudulent, within the meaning of the statute regulating and defining the powers and duties of the State Canvassers.

Like the question of the legality of a vote, this is a question of law to be determined by a court—a judicial question beyond the power and jurisdiction of a ministerial officer under the law, constitutional and statutory. A return of votes cast in a county at such a *general election*, duly signed by acknowledged county officers, and regular in form, of which election no notice by county officers as to polling places is given, (the time of election being according to the general notice,) is a return which the State Canvassers must count, as it is neither irregular, false, nor fraudulent within

the meaning of the statute. Whether such vote is effective to vest the office is a question judicial in its character, which this court upon mandamus should no more determine than should the State Canvassers. Such Canvassers must count such returns, and so this court should order. Whether all these votes so returned are legal votes is another question, which neither the State Canvassers can determine in their action, nor should this court determine it when it is sought to direct them to perform ministerial duties.

As to the Counties of Hernando, Orange, and Leon:

The answer states that a number of votes were deducted from the returns of votes cast in said counties because they were illegally cast, and that a vote was deducted from the return of Jefferson county because it was fraudulently cast. These, as we have before said, are questions which the law does not authorize the Board to determine. They must count these returns, as they admit them by the pleadings to be returns within the meaning of the statute. They nowhere allege the returns to be so "irregular, false, or fraudulent," that they cannot determine the vote cast from them.

As to the County of Clay:

The answer states that 35 votes were added upon the ground that said votes had been improperly rejected by the County Canvassers of the vote of said county at said election, and that six votes cast were deducted upon the ground that said votes were cast by non-residents of the county. It follows from the view we have taken of the law applicable to the powers and duties of the State Canvassers, that any statement of votes by precinct inspectors, which were not included in the canvass made by the County Canvassing Board, cannot be counted by the State Board, the powers of the latter being confined by law to counting only such

votes as are duly returned by the County Board. Such votes cannot be legally included in the estimates of the State Canvassing Board.

The question of jurisdiction raised in the pleadings, as well as the other questions of practice and power, are all adjudicated in the case of the State on the relation of Bloxham vs. The Board of State Canvassers, 13 Fla., 74, 5-6, and it is unnecessary to repeat here what is there said.

Under the pleadings, and the Constitution and statute as applied to them, our judgment is that the demurrer must be sustained and the peremptory writ must be awarded.

On the 22d day of December, after the reading of the foregoing opinion, the respondents, McLin and Cowgill, moved for leave to file an amended answer to the alternative writ, setting forth the character of the election returns as the same appear upon their faces; but on the next day this motion was withdrawn, and the judgment of the court sustaining the demurrer, and directing the issuance of the peremptory writ, was entered, as follows:

"This day came the parties by their attorneys, and thereupon the matters of law arising upon the relator's demurrer to the answers, original and amended, of the respondents, being argued, it seems to the court that the said answers and the matter therein contained, are not a sufficient answer in law to the alternative writ issued herein, and that said return is insufficient. Therefore it is considered that a peremptory writ be awarded directed to the said Samuel B. McLin, Secretary of State, William Archer Cocke, Attorney-General, and Clayton A. Cowgill, Comptroller, Board of Canvassers of Elections of the State of Florida, commanding them that they forthwith meet and convene and reassemble as a Board of State Canvassers in the office of the Secretary of State, to canvass and count all the election re-

turns on file in the said office of the Secretary of State of the said election for the office of Governor, held on the 7th day of November, A. D. 1876, and that as such Board of State Canvassers they canvass and count the returns for said office from each and every of the counties of this State, wherein an election was held for said office, and, especially, that they do canvass and count the said election returns from the said counties of Jackson, Hamilton, Manatee, and Monroe, and that they determine from a canvass and count and examination and tabulation of all the votes cast for the said office of Governor at said election in all the counties of the State, as shown by the election returns of said election received at the office of the Secretary of State, who has been elected by the highest number of votes to the said office of Governor as shown by the said returns, and that they do, as such Board, make and sign a certificate, as required by law, containing in words and figures written at full length, the whole number of votes given at said election as shown by said returns for the said office of Governor of the State of Florida, and the number of votes given for each person voted for for said office, and in said certificate declare the result of the said election for Governor of the said State.

"And that they do perfectly execute this writ on or before the 27th day of December, A. D. 1876, and how they shall have executed it make return to our Supreme Court on that day by four o'clock P. M. in writing, to be filed in the Clerk's office of said court."

The peremptory writ was issued pursuant to the judgment of the court, and served upon the respondents.

On the 27th day of December, at 1.30 P. M., the Attorney-General filed a paper purporting to be an answer to the peremptory writ, in which he states that on the 25th of December he made application to the Secretary of State, McLin, to know upon what day he would convene the

Board of State Canvassers to execute the judgment of the court. and that he replied, "Not to-day, Christmas being a holiday; to-morrow you will be notified." That on the 26th he received a notice from the said Secretary of State to meet with him and the Comptroller on the 27th, at *eleven o'clock A. M.*, for the purpose of making the re-canvass as ordered by the court; but that on the 27th, before the hour of *eleven A. M.*, he received another notice from him withdrawing the former, and that thereupon he requested of the Secretary of State and obtained immediate access to the election returns; that he made a canvass of the same, the result of which he gives as follows: The whole number of votes cast for the office of Governor 48,732; and that of these Geo. F. Drew received 24,613, M. L. Stearns 24,116, D. S. Walker 1, and W. L. Hutchings 1, and one blank. In this answer he also reports having made a canvass of the votes cast for Lieutenant-Governor, and gives the result of the same, and appends to the answer a tabulated statement of the number of votes cast in each of the several counties for the office of Governor and Lieutenant-Governor.

On the same day, at four o'clock P. M., the Secretary of State, McLin, who was chairman of the Board, reported to the Court, in writing, that the Board had organized for the purpose of re-canvassing the votes for Governor in obedience to the order of the court, and was engaged in making the canvass, and would report to the court at the earliest practicable moment.

On the 28th of December, the Secretary of State, McLin, and the Comptroller, Cowgill, made a return to the peremptory writ, the same consisting of a certificate under section 4 of the statute heretofore set out, and which is more fully explained in the opinion of the court following hereafter, giving the whole number of votes cast at the election and given for each office, and for each person for each office, and members of the Legislature, and of the following paper pur-

porting to be both a protest and return of the result of a canvass of votes cast for Governor and Presidential Electors:

"The said Samuel B. McLin, William A. Cocke and Clayton A. Cowgill, members of the Board of Canvassers of the State of Florida, acknowledging service upon them in due form of the writ of mandamus issued by order of the Supreme Court, in the above entitled proceeding, and taking cognizance of the orders therein, both general and special, and particularly the requirement making report of the action of said Board, under the said writ, due to the said court at the hour of four o'clock P. M., of December 27, beg leave respectfully to make return to the court in discharge of its orders in the premises, and also of said writ, requesting that this, their return, may be accepted in discharge thereof.

First. They respectfully, but as of right, enter their protest against doing, and being required to do, any and all the things of them ordered by the said writ of the said Supreme Court; and in connection therewith they deny that the court could rightfully take jurisdiction of the said proceeding and assume to issue said writ against them, because they say the election, the returns of which they are directed now to re-canvass, was a mixed election, being partly for officers of the State of Florida and partly for Representatives in Congress, of which election they say they were officers within the meaning of Section 5515 of the Revised Statutes of the United States; and being such officers, they say they were bound to observe every duty by the law of Florida imposed upon them in regard to such election, subject to the pains and penalties, by the said section prescribed, for neglect or refusal to perform such duties. And as they were not at liberty, under the said election law of Florida to separate the returns for Representatives in Congress from the returns for State officers, for purposes of canvass and count, neither can the court make order requiring them to canvass said returns separately and by different rules.

They further say in protest that as such Board of Canvassers they did heretofore, to-wit: on the day of the 6th instant. assemble, and, as in their judgment, they thought required by the law of Florida, section 4 of the act approved February 27, 1872, canvass the returns of the election held November 7, 1876, being the same returns they are now by the court ordered and required to re-canvass; that in such former canvass some of the said returns were contested for alleged irregularity, falsity and fraud, in which case proof was heard by the Board to ascertain, if possible, the true vote cast for the several candidates in the counties or precincts of counties so contested, with result that in some instances the aggregate of votes as it appeared on the face of some of the returns was changed by the Board to correspond with the aggregate of the true vote, as the same appeared by the evidence, while in other cases the returns were entirely rejected, and that, in conclusion of the inquiry, the majority of the Board did determine and declare, as to them appeared right, just and lawful, that the candidates for Governor received votes as follows:

Marcellus L. Stearns received 23,666 votes;

George F. Drew received 23,208 votes.

And that the candidates for Lieutenant-Governor received as follows:

David Montgomery received 23,578 votes:

Noble A. Hull received 23,273 votes.

And that the candidates for Congress received as follows:

William J. Purman received 12,356 votes;

R. H. M. Davidson received 12,061 votes:

Horatio Bisbee, Jr., received 11,289 votes;

Jesse J. Finley received 11,148 votes.

And that the candidates for Presidential Electors received as follows:

Frederick C. Humphreys received 23,849 votes;

Charles H. Pearce received 23,844 votes;

Thomas W. Long received 23,843 votes;
William H. Holden received 23,848 votes;
James E. Yonge received 22,923 votes;
Wilkinson Call received 22,919 votes;
Robert B. Hilton received 22,921 votes;
Robert Bullock received 22,919.

And that candidates for other offices involved in the said election, each received the number of votes set opposite his name, the same being considered his true vote, all which will more fully appear by reference to the certified declaration of result on file in the office of the Secretary of State, whereupon the said Board did, by resolution passed, adjourn their session *sine die,* and cease to have legal existence, insomuch that it is not possible for any court to reassemble them or revive their functions for any purpose whatever.

Wherefore, in nowise abating our respect for the court, we declare of the re-canvass now hereinbelow returned to the court, made in conformity to the rules laid down for such re-canvass in the decision promulgated by the Court in the above entitled cause, and, on account of such rules, attaining another and different result from the first, and in our judgment, only lawful canvass, that we regard it as a return void of effect.

And we respectfully pray the Court that this protest may be admitted as part of such return, and become of the record of the Court.

And now, obediently to the order and writ aforesaid, the undersigned, having in the first place re-assembled as a Board of Canvassers of the State of Florida, proceeded to re-canvass the returns of the several counties of the election for Governor, taking for the purpose the returns now on file in the office of the Secretary of State; and they return the following as the determination and declaration of the result of such re-canvass, to-wit:

Of the candidates for Governor—

George F. Drew received 24,179 votes;
Marcellus L. Stearns received 23,984 votes.

And the undersigned make further return to the Court, and say that, though not ordered so to do by the Court, for various reasons they deemed it best to make, while re-assembled as a Board as aforesaid, a re-canvass of the said returns of the said election on file in the office of the Secretary of State of and concerning the election of other officers voted for at said election, for which the court is respectfully referred to the certificate of the result of the election herewith appended as part of this return.

And the undersigned further inform the court that we regard our former canvass of the returns of the election for electors for President and Vice-President of the United States, on file in the office of the Secretary of State, as conclusive; yet, in view of the decision of the Supreme Court we have re-examined the said returns and find that re-canvass of them, according to the said decision, would show that of the candidates for said electors—

Frederick C. Humphreys received 24,215 votes;
Charles H. Pearce received 24,211 votes;
Thomas Long received 24,209 votes;
William H. Holden received 24,215 votes;
James E. Yonge received 24,004. votes;
Wilkinson Call received 24,001 votes;
Robert B. Hilton received 24,001 votes;
Robert Bullock received 24,001 votes;
All of which is respectfully submitted.

SAM. B. MCLIN,
Secretary of State and Chairman Board of State Canvassers,
C. A. COWGILL,
Comptroller of Public Accounts."

On the same day the Attorney-General filed the follow-

ing protest against said return of the Secretary of State and Comptroller:

To the Supreme Court of the State of Florida:

I ask permission of the court to file this my protest against the return of S. B. McLin and C. A. Cowgill, members of the Board of State Canvassers, in the above stated case:

1st. I protest against the return signed by the judge, &c., from Baker county, because the Board has knowledge that it does not give the true vote, and is therefore false and fraudulent.

2d. I protest against throwing out the return from Clay county, because it is in all respects regular on its face. The fact that it omitted the vote at one precinct, and referred the question of counting the vote of said precinct to the Board, is no ground for throwing out the whole vote of the county, and is in direct opposition to the decision of the Supreme Court. WM. ARCHER COCKE,

Attorney-General.

Upon the filing of such return of the Secretary of State, McLin, and Comptroller Cowgill, the relator moved to strike out from the same all from the word "*First,*" on page 55, down to and including the words "record of the court," on page 57; and this motion was argued by

Mr. R. B. Hilton and *Geo. P. Raney* for the relator, and *M. J. P. C. Emmons* for respondents, McLin and Cowgill.

And afterwards, on the first day of January, A. D. 1877,

MR. JUSTICE WESTCOTT delivered the opinion of the court.

We propose not only to dispose of the motion in this case made and submited this morning, but also to announce our views in reference to the whole subject matter of what is called a return to the peremptory writ in this cause.

The first and only general question involved in this whole matter is, what is in form and substance the legal and proper paper to be filed by a respondent in response to a peremptory writ of mandamus?

The second question is, have the respondents complied with the law in this respect?

The third question is, in case they have or have not complied with the law, what is the proper order to be made by the court in this behalf?

To the first question, what is the legal and proper paper to be filed by a respondent in response to a peremptory writ of mandamus? Upon this question there is no conflict in the authorities. "There is strictly no *return* to a peremptory writ. It is to be obeyed, and a certificate is made of what has been done." This is the language of Mr. Justice Woodward, in delivering the opinion of the Supreme Court of Iowa, (9 Iowa, 335,) and such is the view announced by all the courts, English and American, so far as the cases decided by them upon the subject, have been examined by us. (Tapp. on Man., 61, 389, 445, and 456.) The granting "a peremptory writ implies that the party has been fully heard, and therefore he can allege no reason why he has not obeyed it." Such is the language of Mr. Chief-Justice Ruffin, of the Supreme Court of North Carolina, in the case of The State vs. Robert Jones, *et al.*, 1 Ired., 414. If such be the necessary inference, and in this case such inference corresponds with the fact, for the parties have been fully heard, then the pleadings, so far as the propriety of granting the writ is concerned, and as to matters of defense to the action proper, are closed, and the necessary result is that no such matter can be considered or be made the subject matter of any response to this peremptory writ.

We have to apply these plain simple principles of law to what here purports to be a response to the peremptory writ. The first paper which we have on file connectd with what

purports to be a "return" to the writ, is the certificate which constitutes the evidence and statement of a canvass made by the Board of State Convassers of votes cast at a general election held in this State on the seventh of November, A. D. 1876. The statute regulating this subject provides that the Board shall make and sign a certificate containing in words written at full length the whole number of votes given for each person for each office, and for members of the Legislature, and therein declare the result, which certificate shall be recorded in the office of the Secretary of State in a book to be kept for that purpose, and the Secretary of State shall cause a certified copy of such certificate to be published once in one or more newspapers printed at the seat of government. The proper and only legal place of deposit of this original certificate, constituting the evidence of important action by State authorities, is the office of the Secretary of State. It is, under the statute, the basis of important official action which the law imposes upon him, and it should be upon the files of his office as evidence of the fact that the certificate recorded and published by him is a correct copy of the original, and that his duty in this respect has been properly discharged. As to this paper, therefore, it is improperly and illegally on the files of this court. Under the statute it has its proper place, and to that place it is as much the plain duty of this court to send it as it is the manifest duty of this officer to receive and file it. Therefore it is the order of the court that the Clerk of this Court deliver this paper to the Secretary of State of the State of Florida. And the Clerk of this court is directed to transmit to said officer at the same time a certified copy of so much of this opinion as refers to the proper place of deposit of this certificate.

The second paper on file connected with what purports to be a "return" is what is called the "protest" of the respondents, Cowgill and McLin. This court is not and

should not be offended at the filing of any respectful and proper protest to any or all of its action at the proper time and under circumstances which authorize such action. Such protest will always, when so filed, receive that respectful and calm consideration which it is the right of every man to have at the hands of a judicial tribunal. In this case the matter of jurisdiction which this "protest" proposes again to raise was made the subject of defense by the respondents, Cowgill and McLin. We have heard them fully. We have determined that we have jurisdiction. It is our duty to enforce it. It is the duty of the respondents to obey. Under the circumstances of this case, and as a response setting up matters of defense as to which these parties have been already heard, it is not proper here. We cannot hear further argument as to this matter. We cannot act as though the pleadings proper in this cause are now open to amendment. The pleadings are closed, and the simple duty of the respondents is to obey the writ and to make a certificate of their obedience. Again, this paper, like the first paper we have considered, purports to set up a canvass of votes cast for other persons and officers than George F. Drew, Marcellus L. Stearns and other persons *for Governor*. The only relator in this case is George F. Drew. All of the other persons mentioned in these papers as receiving votes for various offices, and who are declared elected to such offices, are in no manner parties to this controversy. As a judicial tribunal we should take no action which can directly affect their rights or approve any action by the Board of Canvassers affecting their rights, except according to the law of the land, which is after notice, hearing and trial. In a pleading in equity this would be impertinent and irrevelant matter. In a common law proceeding it is surplusage to be quashed and set aside upon motion. It is therefore ordered that the same be set aside and quashed as surplusage, having no connection with any proper response to the peremptory writ.

This court is not a Board of Canvassers. If the Board see proper to canvass the returns of votes with reference to offices other than that of Governor, in conformity to their duty as defined by this court, that is a matter as to which we can decide nothing. It is not here involved.

As to the separate answer of respondent, William Archer Cocke, Attorney-General of the State of Florida, it must be set aside and quashed. Its approval, like the approval of what purports to be a protest, would be approval by this court of action by the Board affecting others than the relator in this cause. This brings us to the consideration of the particular motion here made. It must be denied. This court cannot simply strike out that portion of the protest sought to be stricken out under this motion, thus leaving a large part of this paper which we have already stated must be quashed.

In determining this matter the court must be permitted to say that its decision here establishes in all future proceedings by mandamus what is in form and substance a proper response to a peremptory writ in this State. It becomes us to be careful, and that we do not prescribe a rule of practice which may hereafter be shown, as applied to the rights of this people, to be erroneous. The conclusion we reach is, that these respondents have made no response which this court can accept.

Their duty is plain and simple under this peremptory writ. It is to canvass, count, and add up returns of votes cast in the several counties in this State for the persons voted for for the office of Governor. This act involved writing to the extent of one or two pages, and we think the duty can be performed in two or three hours.

The order is that the "return" to the peremptory writ is quashed; that the paper purporting to be a certificate of a canvass of votes cast on the seventh of November A. D. 1876, at a general election in this State, be returned to the

office of the Secretary of State by the Clerk of this court; that what purports to be a protest, as well as the return, signed by William Archer Cocke, Attorney-General, be quashed; that an order be made repeating the peremptory writ, and directing a strict compliance with the order and direction of the court in this behalf; and that the respondents do perfectly execute the duty heretofore and hereby enjoined upon them by half-past five o'clock p. m. of this day.

After the filing of this opinion, the following order was entered:

The court having considered the motion of relator, and being advised of its opinion to be given in the premises, it is ordered that the motion of the relator to strike out certain portions of the paper called a "protest," filed herein by the respondents, be and the same is denied.

Ordered further, that the said paper called a "protest" be and the same is set aside and quashed as in no manner constituting a proper response to the peremptory writ; and as to the separate answer of the Attorney-General, it is ordered that the same be set aside and quashed.

It is further ordered, that the paper purporting to be a certificate of a canvass of votes given at a general election in this State, signed by the Board of State Canvassers, be returned by the clerk to the office of the Secretary of State, together with a copy of so much of the opinion of this court herein as relates to the proper place of deposit of said paper.

And it is further ordered, that the respondents strictly comply with the order and mandate of this court in this behalf, to-wit: That they canvass and count the returns for said office from each and every of the counties of this State, wherein an election was held for said office; and especially that they do canvass and count the said election returns from the said counties of Jackson, Hamilton, Manatee and

Monroe, and that they determine from a canvass and count and examination and tabulation of all the votes cast for the said office of Governor, at said election, in all the counties of the State, as shown by the election returns of said election received at the office of the Secretary of State, who has been elected by the highest number of votes to the said office of Governor as shown by the said returns; and that they do, as such Board, make and sign a certificate as required by law, containing in words and figures written at full length the whole number of votes given at said election, as shown by said returns, for the said office of Governor of the State of Florida, and the number of votes given for each person voted for for said office, and in said certificate declare the result of the said election for Governor of the said State; and that they do perfectly execute the duty herein and hereby enjoined by the hour of thirty minutes past five o'clock P. M. of this day.

And on the same day this order was duly served on the respondents, and they filed a return to the peremptory writ, stating that in pursuance to said writ they had proceeded to re-canvass, according to the face of the returns as made by the county canvassers, the votes cast at the election held on the 7th of November, 1876, for Governor of Florida. In this return there is given a detailed statement of the number of votes cast in each separate county for the office of Governor, and for each person for such office, except the county of Clay, the returns from which the Board rejected, "because on their face they appeared to be false and only represented a part of the votes actually cast for Governor in that county." This return also states as the result of the canvass that the whole number of votes cast in the State for Governor was 48,166, and that of these M. L. Stearns received 23,984 and George F. Drew 24,179, D. S. Walker 1, Irander Trearson 1, and William Hutchins 1, and concludes

by certifying and declaring that George F. Drew was elected Governor of Florida. Attorney-General Cocke appended a note to this return stating that he differed from the majority of the Board as to rejecting the Clay county return, and as to which was the legal return from Baker county.

On the 2d day of January, 1877, the respondents filed an amendment to the above return, stating that they had filed in the Secretary of State's office a certificate under said Section 4 of Chapter 1868, Laws of Florida, containing in words written at full length the whole number of votes given for the office of Governor on the 7th day of November, 1876, as appears by such re-canvass of votes.

The court thereupon made the following order, striking out the detailed statement of the votes cast in the several counties from said return, so as to make the same conform to the views of the court:

And now, on reading and filing the certificate of the respondents under date of January 1, 1877, and the additional certificate of the respondents filed this day, and the relator not objecting, it is considered by the court that the said respondents have substantially complied with the mandate of this court in this behalf. But, because the respondents have incorporated in their said certificate a detailed statement of votes cast in the several counties at the late election, which said detailed statement was not required by the order of this court, and with which this court in this proceeding has no concern, and in the making and incorporating such statement in their said certificate the said respondents have unnecessarily encumbered the records of this court with matter not pertinent or material, it is therefore ordered by the court, of its own motion, that all such detailed statement be and the same is hereby quashed and struck out, leaving and saving the rest and residue of said response to stand as a

substantial compliance with the requirements of the law as to the matter before this court.

It is further considered and adjudged that the respondents, Samuel B. McLin and Clayton A. Cowgill, pay the costs of this proceeding.

DECISIONS

OF THE

Supreme Court of Florida,

JANUARY TERM, A. D. 1877.

J. S. DUPIUS, PLAINTIFF IN ERROR, vs. J. J. THOMPSON, DEFENDANT IN ERROR.

1. Pleading over after judgment upon demurrer, and taking issue upon or replying to the pleading, is a waiver of the demurrer.
2. The entry of the grounds of a motion for new trial upon the motion' docket, is a filing of the reasons for such motion with the Clerk as required by the statute.
3. The rules of practice of the Circuit Court require notice of a motion for new trial, and where the party fails to give such notice, the court may properly refuse to consider the motion.
4. A motion for new trial is not a waiver of exceptions, and if for any reason such motion cannot be considered in this court, and the exceptions during the trial are properly embodied in the record, we can review the rulings of the Circuit Court in this respect. As to this matter the case then stands substantially in the same attitude that it would have been before the statute authorizing a review by this court of the rulings of the Circuit Court upon a motion for new trial.
5. After a deed has been offered and read in evidence to the jury without objection, and the party offering it in evidence has closed, it is too late to insist upon the formal proof of its execution.
6. Where a charge embraces several distinct propositions, a general exception to the charge is not available if any one of the propositions is correct.
7. The legal presumption is that an officer does his duty when acting under a general power, such as a sale under *fi. fa.* A party claiming under a sheriff's deed of this character, need not prove the advertisement when he puts in evidence the judgment, the execution, the

levy, the return of the sheriff, and his deed reciting due and legal advertisement and sale.

Writ of error to Circuit Court for Alachua county.

The opinion of the court contains a sufficient statement of the facts of the case.

S. Y. Finley and *O. A. Myers* for Plaintiff in Error.

Thomas F. King for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This action is ejectment. To the declaration which was drawn in strict conformity with the statute upon the subject there was a demurrer, which being overruled the defendant filed pleas, and to these pleas the plaintiff interposed the general replication. Afterwards the defendant filed, with leave of the court, a plea *puis darrein continuance,* and to this plea plaintiff filed "joinder and replication." There was a verdict for plaintiff and motion for new trial by defendant. A hearing of this motion was denied, the motion was overruled, and there was judgment for plaintiff, awarding writ of *habere facias possessionem* and damages. To this judgment defendant Dupuis takes this writ of error.

The first error assigned is the judgment of the court overruling defendant's demurrer to plaintiff's declaration. The defendant having "plead over," he waives his exception to the ruling upon the demurrer, and the matter cannot be reviewed in this court. 6 Fla., 516; 8 Fla., 206, 453; 14 Fla., 497; 5 How., U. S., 29; 3 Stewart, 444.

The next error assigned is the refusal of the court to set aside the verdict and award a new trial. The entry in the record showing the action of the court upon the motion for new trial is as follows: "And the said motion having been brought before the court for a hearing on the 7th day of

April, A. D. 1875, the plaintiff's attorney objected to the court considering the same on the ground that no notice of said motion had been given to the opposite party, and no reasons in writing for making said motion had been filed with the clerk, which objection the court sustained. The court then overruled said motion for a new trial, and to these rulings the defendant excepted."

The statute provides that "no motion for a new trial shall be made unless the party intending to make the same shall file his reasons with the clerk in writing, and cause his motion to be placed upon the motion docket within four days after the verdict shall have been rendered and during the same term." Thomp. Dig., 351.

In this case the reasons or grounds of the motion follow the entry of the motion on the motion docket, and that is a sufficient filing with the clerk. It is not required that a *separate* statement of the reasons for the motion should be filed with the clerk. If the grounds of the motion are on the motion docket, that docket being in the custody of the clerk, it is a compliance with the law. The objection, however, that no notice of the motion was given to the opposite party was a good objection to its consideration. The 53d rule governing the Circuit Court in common law actions provides that "motions required by law, or by these rules, shall be in writing, and due notice given to the opposite party;" and the 41st rule requires such motion to be entered upon the motion docket. If it appeared affirmatively upon this record that the motion was made in open court in the presence of the opposite party, this would be held due notice, or if the record was silent upon the question, and there was a hearing, that would be sufficient, but where it affirmatively appears that no notice was given, we cannot set aside the action of the Circuit Court in enforcing a plain, simple rule of practice prescribed by this court. The court, in disposing of this question, "overruled" the motion, and

it may be insisted that this involved a consideration of the grounds upon which it was based. An examination of the entry, however, will show that the objection for want of notice was the ground of the action of the court, and while the entry might have stated more clearly that the court *refused to consider* the motion, still a fair construction of the record gives it that effect.

The other errors assigned are based upon exceptions taken during the progress of the trial. In some of the State courts, and in some of the courts of the United States, it has been held that a motion for a new trial is a waiver of the exception taken to the rulings during the progress of the trial. 5 Mason, 173; 1 Mass., 237; 3 Ark., 144; 4 Ark., 89; 10 Ark., 246; 2 Chit., 272; 2 Black., 929; Comp., 151; Loft., 262. Before the act of 1853 (Chap. 521, Laws,) the decision of the Circuit Court upon a motion for a new trial was held by this court to be a matter of discretion not subject to review. 4 Fla., 356. This statute having granted this right, it has been the constant practice of this court to review such decisions, and in connection with them exceptions to matters occurring during the progress of the trial, which were before this statute the proper subjects of review, and which, upon a writ of error from the Supreme Court of the United States, were the proper subjects of review in that court, although in that court the rule was and is that the matter of granting a new trial by the Circuit Court of the United States would not be reviewed. The Supreme Court of the United States has held in several cases that a motion for a new trial is not a waiver of exceptions, (4 Wall., 182, 6 How., 179,) and this is the rule in this State. While this court has not expressly ruled upon the point, yet it has by its uniform practice disregarded the idea that a motion for a new trial in the Circuit Court is a waiver of exceptions. We have, therefore, in this case left for our consideration the errors assigned, based upon excep-

tions taken to the action of the court during the progress of the trial. We cannot consider here the objection that the verdict was contrary to law, or to the evidence, or to the instructions of the court, or any objection to the sufficiency or weight of the evidence, or that the damages awarded were excessive, because the only remedy for these matters was the motion for new trial, which was not heard by the court, and which is not here for review. 9 Pet., 483; 3 Wall., 240.

What are these exceptions? The first exception of the defendant is to the ruling of the court to the effect that after a deed has been read to the jury without objection, and the party offering it in evidence had closed his testimony, it was too late to insist upon formal proof of its execution. This ruling was correct. By not requiring proof of its execution when the deed was offered, the party waived any right which he may have had. 5 Fla., 268, 284; 17 Mich., 48; 4 Dall., 424; 30 Vt., 90.

The next exception is to the testimony of the plaintiff as to the rental value of the land. It was objected to upon the ground that it was conjectural. He testified that "he thought the yearly rents of said land were reasonably worth one dollar per acre, and estimated the cleared land at 500 acres." This exception is not insisted upon in argument here, and no attention is given the subject in the briefs of counsel. This testimony is not as accurate as would have been that of a surveyor who had, by actual measurement, determined the amount of land, but we know of no rule of law which renders it inadmissible because it is not so absolutely certain and accurate. It was pertinent and relevant to the questions involved in the issue, and was properly admitted.

The next exception is a general exception to the charge of the court. This charge embraced four distinct propositions, and this general exception is not available if any one

of them is correct. 14 Fla., 492; 1 Black., 209; 3 Seld., 273; 2 Ker., 213. One of these instructions is to the effect that if the defendant failed to insist upon proof of the execution of a deed, when it was offered and received in evidence, he could not subsequently object on the ground that its execution had not been proved. This instruction was certainly correct, and for this reason this general exception must fail. The next exception disclosed by the record was the refusal of the court to give the portion of the following charge which is embraced in parenthesis: "If the plaintiff fails to prove the advertisement of sale as required by law, which it is incumbent on him to prove as a link in his chain of title, he fails to make out his title, and the jury should find for the defendant when the plaintiff does not prove the advertisement. (The exhibition of the deed is not sufficient; the recitals in the deed must be proved to the satisfaction of the jury, and the advertisement is necessary to plaintiff's title, and must be proved by evidence other than the recital in the deed."

The court very properly refused to give this instruction. There was in evidence here the judgments, the executions, the return of the sheriff, the levies and the deed of the sheriff reciting due advertisement and sale. This was more than sufficient. In sales under execution, under the circumstances recited, it is not necessary to prove the advertisement. The presumption of law is that the sheriff did his duty in this respect when acting under a general power. 1 Tenn. 348; 3 Yerg., 308; 53 Penn. State, 302; 3 Jones (N. C.) Law, 135; 3 Mon., 271; 2 G. & J., 359; 1 Phil. on Ev., 177; 2 ib., 429; 6 Ind., 80-1; 2 Ind., 465; 5 Hill, 228; 3 Minn., 277; 5 Maine, 333; 22 Barb., 656. There is a well settled difference between the case of a sale by a sheriff under a judgment and execution, by virtue of a general power vested in the officer to sell under *fi. fa.*, and a sale under a special power to sell in particular cases. The case cited by

counsel (7 Conn., 88,) is of the last character, and is not applicable here. Presumptions do operate as to acts necessary in the execution of a general power of the character here in question.

This disposes of all the questions which this record, according to the rules of practice controlling the subject, presents for our consideration.

It was insisted in argument that the plaintiff in this action was a purchaser of this real estate at an execution sale against a defendant in execution, with actual notice by the purchaser at the time of the judgment that the defendant in execution had given a mortgage upon the property to the lessor of the defendant in this action, and that defendant claimed through a sale under the mortgage of which the plaintiff thus had notice. In other words, that the plaintiff was a purchaser at an execution sale with notice of a mortgage by defendant in execution prior to the judgment, under which he purchased, and that defendant here claims under such mortgage. It was also insisted that plaintiff, who claims title through an execution sale, failed to show that the defendant in execution had any title or interest in the property sold, and that such proof was necessary, although both parties claimed through the defendant in execution.

Neither of these questions are presented by the records, as the motion for new trial cannot be considered for the reasons already stated. For want of notice the Circuit Court refused to consider it, and its action was in accordance with the plain rule controlling the subject. The only question here as to that motion is, did the court properly refuse to hear it? Having determined that, its action in that respect was in conformity to the rule; that is an end of the matter.

Judgment is affirmed.

WILLIAM NICKELS AND THOMAS N. GAUTIER, PLAINTIFFS AND APPELLANTS, VS. EDWIN W. MOORING, DEFENDANT AND APPELLEE.

1. The Court will not set aside the verdict of a jury upon questions of fact, where there is a conflict of evidence, unless it may well be assumed from the circumstances of the case that some improper influence has been brought to bear to affect such jury contrary to the right.

2. The Court will not reverse a judgment simply for the reason that immaterial evidence was introduced on the trial. It must appear that such evidence was legally prejudicial to the parties' rights, or calculated to have an injurious influence upon the minds of the jury, and to mislead them in their endeavors to arrive at a correct conclusion.

3. Where there is no agreement to the contrary, and no fraud or collusion, each copartner has the right to settle demands due to, and give receipts to bind, the firm, even after the dissolution of such partnership.

4. It is not necessary that the court in charging the jury, as requested by counsel, should use the language of the counsel in announcing legal propositions; and when the Court has already instructed the jury upon a question, it is not error to refuse to repeat the matter so charged, however correct the proposition may be.

Appeal from the Circuit Court for Jackson county.

This is an action brought under the Code of Procedure by the plaintiffs, who had formerly been partners, to recover upon an open account for goods sold and delivered, and for money advanced for and loaned, while such partners, to the defendant. The defendant answered, pleading several defences, and among them payment by William Nickels, one of the plaintiffs, with money of defendant; and as another defence, that the account sued on was transferred and belonged to Nickels before it was paid as alleged. Afterwards the defendant filed a supplemental answer to the effect that since the filing of the original answer he had made full payment of all demands of plaintiffs against him, by giving to

Gautier a check drawn by VanBeil & Fisk, on the First National Bank of New York, and that in consideration thereof Gautier receipted in behalf of said plaintiffs in full to defendant for all demands of plaintiffs. Upon the trial the plaintiffs contended that the payment with Gautier was not in full settlement of all demands, and that it was made and received in fraud of said partnership, and in collusion and fraud between Gautier and Mooring; and that Nickels, at the time of such payment, was the only one authorized to settle the business of said partnership and receive payment of the debts due it, and that Mooring knew it.

There was much conflict in the testimony upon important questions involved in the issues. The jury brought in a verdict for the defendant, and the plaintiffs moved for a new trial upon the ground that the verdict was against the evidence and contrary to law, and that the court erred in admitting testimony which was not pertinent to the issues, but calculated to mislead the jury, and in its charge to the jury, and in refusing to charge the jury as requested by plaintiffs, and upon the ground that the jury gave consideration and weight to an admission of the plaintiff, Nickels, made to an attorney of the defendant as to the right of Gautier to make the settlement set up in the supplemental answer, which admission Nickels testified to have made in ignorance of his legal rights.

In support of the last ground of the motion the plaintiffs introduced two affidavits: one of Nickels, to the effect that "Daniel L. McKinnon, Esq., attorney for defendant,came to deponent and told him he had a receipt in full from Gautier for the account of Mooring; he was taken by surprise, as it was distinctly agreed by and between said Gautier and himself that he, deponent, was to be the sole liquidating partner; and this agreement was published in the *Marianna Courier* for several months, and he is satisfied that said Mooring knew of this agreement; he remarked to said Mc-

Kinnon that he did not care about the receipt, or words to that effect; that if anything else was said by deponent to said McKinnon in the shape of admission, as sworn to by said McKinnon, it was said in ignorance and mistake of his legal rights, and contrary to the real facts of the case. He has no recollection of having said to McKinnon that Gautier had as much right to give a receipt for Mooring's debt as he, the deponent, had, or words to that effect. If he so uttered them, as deposed to, they were said without reflection, hastily, and improvidently, and in mistake of his legal rights. Mr. McKinnon exhibited to him no receipt signed by Gautier at the time of said interview, which was a brief and hasty one; that he saw McKinnon after said interview, which was a brief and hasty one,between the time of defendant filing his supplemental answer and his deponent's replication thereto, and then, for the first time,he saw the receipt made by Gautier. McKinnon, at this second interview, asked him *what he intended doing about the suit?* meaning the present suit,and deponent replied *that he intended to fight it out.* He made this remark, being convinced that Nickels and Gautier had been defrauded by said Mooring, and Gautier in and by giving of said receipt; and that he, the deponent, believes that the jury, in forming their verdict for the defendant, did so entirely upon admission of deponent as testified to by McKinnon." And another affidavit made by two of the jurors, who heard the case,to-wit: B. Baker and J. W. Rawls, to the effect "that they were upon the jury that rendered the verdict in the case, and in coming to a conclusion as to what their verdict should be, the admission of Mr. William Nickels, one of the plaintiffs to Mr. McKinnon, 'that Mr. Gautier, one of the partners, had as much right, as he supposed, to give the receipt as he had, or words to that effect,' had much weight with them in forming their verdict, and not being instructed by the court that an admission made by a party in ignorance and mistake of his

legal right is not binding, they gave full validity to the receipt."

The notice of the dissolution of the partnership was published in 1868, in a newspaper at Marianna, Fla., and was as follows:

"*Dissolution of Copartnership.*

"The copartnership of Nickels & Gautier dissolved by mutual consent. All accounts and business of the concern will be settled by William Nickels, who is desirous for all those who are indebted to make immediate payment.

"WILLIAM NICKELS,

"January 18-tf "THOS. N. GAUTIER."

The other facts necessary to an understanding of the case are stated in the opinion of the court.

Geo. S. Hawkins and *W. H. Milton,* for Appellants.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action of assumpsit brought by the plaintiffs, who were merchants, under the provisions of the Code, in January, 1872, against the defendant Mooring, for goods, wares, and merchandise sold and delivered to the defendant, and claming judgment for $1,388.88, besides cost. Attached to the complaint in the cause was a bill of the items of the plaintiffs' account, running from November 24th, 1862, to July 17th, 1867.

Previous to the commencement of this action, and in the year 1866, the plaintiffs had dissolved their connection as partners, and the business of the said firm was left in the hands of Wm. Nickels, one of them, to be settled, as appears by the notice of dissolution introduced in evidence.

Pending the action, and before it came on to be tried, the defendant Mooring compromised, settled, and paid the ac-

count, upon which the action was brought, to Thomas N. Gautier, the other partner in the concern, and one of the plaintiffs, and took his receipt in full for all demands due from him to the said plaintiffs as copartners. The plaintiff Nickels insisting that such payment was not a satisfaction of the claim of Nickels & Gautier, and that it was a fraud upon the said firm, and that it was made by collusion between the defendant Mooring and the plaintiff Gautier, pressed the suit to a trial, and the jury, after hearing all the proofs introduced on behalf of the respective parties, found a verdict for the defendant.

The questions arrising upon the trial were principally questions of fact, and have been, therefore, determined by the finding of the jury. This court will not interfere to set aside the verdict of a jury upon questions of fact, where there is a conflict of evidence as in this case, unless it may well be assumed from the circumstances of the case that some improper influences have been brought to bear to affect the jury contrary to right. Wilson & Wilson vs. Dibble, 14 Fla., 47.

In this case it does not so appear from the record. The question of the sale and delivery of the goods to defendant, their value, the dissolution of the copartnership, the publication of the notice of such dissolution, and of the knowledge of such dissolution by the defendant, were all matters of proof, and evidence in reference to each and all of them was introduced by both parties. It is true that some evidence was introduced immaterial to the issues on trial. The two letters, one of date January 15th, 1872, from Wm. Nickels to the defendant Mooring, and the answer to the same without date, were of such character; but these letters were both introduced by the plaintiffs and not by the defendant, and seem not to have been objected to. This fact appears in the amendments to the case and exceptions allowed and settled by the judge who presided at the trial.

The subsequent letter from the defendant to Nickels, dated November 25th, 1872, was introduced by the defendant's counsel and objected to by the plaintiffs. It was probably offered for the purpose of doing away with the impressions which might be created by the former letter from Mooring to Nickels, previously introduced by the plaintiffs. It is a family letter, and while entirely immaterial to the issue, we cannot see how it could operate in any way legally prejudicial to the rights of the plaintiffs.

The court will not reverse a judgment simply for the reason that immaterial evidence has been introduced on the trial. It must appear that such evidence was legally prejudicial to the parties' rights, or calculated to have an injurious influence upon the minds of the jury, and to mislead them in their endeavors to arrive at a correct conclusion. Thorndike vs. City of Boston, 1 Metcalf, 242; Barry vs. Bennett, 7 Metcalf, 354.

We cannot see how either of these letters could possibly bear upon the issues which were evidently in the minds of the jury when they agreed upon their verdict. They have determined as a matter of fact that the defendant Mooring had no notice of the dissolution of the partnership existing between the plaintiffs; that the said Mooring did pay the dept which he owed to the plaintiffs by the delivering of a check to Thomas N. Gautier, one of the copartners and plaintiffs. It was in view of such finding not a question of importance whether Nickels and Mooring had negotiations for a compromise or arbitration; whether Mooring had, or had not, previously admitted the justness of, or paid the account; or whether there were individual accounts existing between the several parties to the action. The question also of fraud or collusion between Gautier and Mooring has been determined. All the proofs upon which such allegation were based were considered and passed upon by the jury.

The court below, in its discretion, denied the motion for a new trial. This motion was made upon the minutes of the court, and two affidavits, one made by the plaintiff Nickels, and the other by two of the jurors who tried the case. Upon the trial of the cause D. L. McKinnon, a witness introduced upon the behalf of the defendant, testified as follows: "I had an interview with Mr. Nickels, one of the plaintiffs, about a receipt of Thomas N. Gautier, and told him I had a receipt for settlement, and Mr. Nickels said he supposed Mr. Gautier had as much right to settle the suit as he had.

"The following is the receipt:

"'November 6, 1872.

"'Received of Edwin W. Mooring, in full payment of all demands against him in favor of Nickels & Gautier, a check drawn by Van Biel & Fisk on the Fourth National Bank of the City of New York for six hundred dollars, payable to Thomas N. Gautier, or order, and dated June 15th, 1872.

" 'Nickels & Gautier,

" 'In liquidation.'

"I let Mr. Nickels have the receipt, and in a few days he returned it, and said he intended to prosecute the suit."

Subsequently Mr. Nickels himself testified on behalf of the plaintiffs as follows: "I did, at the time I spoke to Mr. McKinnon, make the remark, ignorant of and in mistake of my legal rights. I afterwards, and upon reflection, concluded that Gautier had no right to give the receipt. I afterwards met Mr. McKinnon at the door of the clerk's office, and told him I would prosecute the suit. He handed me the receipt, and I copied it. When I found out my legal rights I told him the suit would go on."

The affidavit read upon motion for new trial, made by the plaintiff Nickels, subsequently restates the evidence he had before given on the trial upon the subject of his ignorance of his legal rights at the time he made the admission to

McKinnon, and alleges that he is informed and believes that the jury in finding their verdict for the defendant did rely upon his said admission as testified to by McKinnon. Baker and Rawls, the two jurors, allege in their affidavit that in coming to a conclusion as to what their verdict should be in the case, such admission of Nickels had "much weight with them in forming their verdict, and not being instructed by the court that an admission made by a party in ignorance and mistake of his legal rights is not binding, they gave full validity to the receipt."

There is no claim that there was newly-discovered evidence. After the evidence of McKinnon had been taken, Nickels, the plaintiff and copartner, was examined as a witness in his own behalf as to the very admission to which McKinnon had testified, and had made his full explanation, that it was uttered in ignorance of his legal rights. The proof was before the jury as fully and particularly as it was possible to be presented, and they must have considered it in coming to a final conclusion. Baker and Rawls, as jurors, were aware of the explanation which had been given by Nickels, because they say that "not being instructed by the court," &c., they gave full validity to the receipt. Had the counsel for the plaintiffs desired any instruction from the court to the jury on this subject, he had opportunity to obtain it; having neglected so to do at the proper time, he cannot now be allowed a new trial for the purpose of trying the experiment. However, it makes little difference whether the admission was made in ignorance of legal rights or not; there is no proof that by the term of the dissolution of the partnership Gautier was not, equally with Nickels, entitled to receive and receipt for demands due the firm. The debt had been settled by Mooring with Gautier, one of the copartners and plaintiffs, and a receipt in full, about the validity of which there is no question, had been given in the name of the firm. Under such a state of

facts one copartner has the right to settle demands and give receipts to bind the firm, even after dissolution of the copartnership. Story on Partnerships, 528; Granger vs. McGilvra, 24 Ill., 152.

We cannot see that the charge of the court to the jury was wrong. It goes in some particulars, perhaps, beyond the necessities of the case under consideration, and touches upon subjects which seem not to have been material to the issues, but it contains nothing which in our judgment tends to mislead the jury. The first part of such charge to which an exception was taken is in the following words: "If, however, it appears to you from the evidence that all debts were assigned and transferred to Nickels as his property, any debtor who had notice of this would be bound to make payment to Nickels alone, and if he paid anybody else he would be obliged to pay the money over again."

There is no evidence in the record that this debt, or any debt due to the firm of Nickels & Gautier, had been assigned or transferred to Wm. Nickels. On the contrary, Nickels himhimself testifies: "The debt belongs to the firm, and was never assigned to me." The notice of the dissolution of the copartnership simply announces that the firm is dissolved by mutual consent, and that the accounts and business will be settled by Nickels.

The second exception to such charge was to the following language: "The obvious duty of all agents is that of keeping exact account of their doings, and particularly of all pecuniary transactions. After a reasonable time has elapsed, you will presume that such an account was rendered, accepted, and settled, otherwise any agent might always remain liable to be called upon for such account."

There was evidence tending to show that Nickels, who was the father-in-law of the defendant Mooring, was his agent for some time.

Mooring testifies that he was captured in "September,

1864. After that time Mr Nickels was my agent. I was absent eight months before my return. Mr. Nickels had large amounts of my money in his hands; can't say how much, belonged to me; can't approximate; several thousand dollars. He did not have less than thirty thousand dollars."

In relation to such agency the plaintiff Nickels testified: "I was agent for Mooring for part of the time the accounts were kept; can't designate the time. I had some Confederate money of Mooring's in hand; can't state the amount. I suppose I have of his in hand now two or three thousand dollars. I was agent for him at different times. Sometimes could not satisfy him, and I would cease. Can't say when agencies commenced or closed; have nothing to show this."

This charge of the court bore directly upon this evidence of agency, and as it is admitted by the counsel for the plaintiff in his agreement "to be correct in the abstract," we conclude that it might, in the consideration of the evidence given by the jury, have a "practical application to the case before the court."

The request of the plaintiffs' counsel that the court charge the jury on the several points set out in the record was substantially complied with. It seems to us that the charge was full and explicit. It is not necessary that the court in their charge to the jury should use the exact language of the counsel in such request. It is sufficient that the substance be embodied in the charge, and the material legal propositions presented clearly to the jury.

The judgment must be affirmed, and such is the order of the court.

DOLLNER, POTTER & CO., PLAINTIFFS AND APPELLANTS, VS. FRANCES SNOW ET ALS., DEFENDANTS AND RESPONDENTS.

1. The wife's *separate estate* is an equitable estate where the legal title is vsted in some other person for her benefit, and the trustee is a necessary party to a suit seeking to charge such estate.

2. In such case the complaint must set up the nature of the trust, and show that such a charge is consistent with and conformable to the laws of the trust as disclosed by the deed or settlement which created it.

3. Neither the Constitution nor the Laws of this State restrict the power of the wife to become the beneficial object of such a grant. Her power to acquire such separate estate is in no way restricted.

4. At common law, the promissory note of a married woman is void. The Constitution and Statute of this State make no change in this respect. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her.

5. There are material differences between the equitable "separate estate" of the wife and the "statutory separate property" of the wife. A complaint or bill seeking to change either should disclose which class of property is sought to be affected.

Appeal from the Circuit Court for St. Johns county.

This is an action brought under the Code of Procedure. There was an answer setting up several distinct defences to the original complaint, and the plaintiffs demurrer to each defence, on the ground that it did not state facts sufficient to constitute a defence to the complaint. The Circuit Court sustained some of the demurrers and overuled others, and held, that as the complaint was defective and demurrers reached back to it, it must be amended. The plaintiffs then filed an amended complaint alleging—

1. That the defendant, Frances Snow, is a married woman, and the wife of the defendant, Henry M. Snow.

2. That the defendant, Jennie P. Spear, is a married woman, and the wife of the defendant, Charles Spear.

3. That the defendant, Frances Snow, on the third day

of August, 1869, at St. Augustine, Florida, made her promissory note, in writing, dated that day, whereby, for value received, she promised to pay to the order of one Walter Ginnity the sum of seven hundred dollars, twelve months after date, with interest, and then and there delivered the same to the said Walter Ginnity.

4. That at the time of making of the said note, the defendant, Jennie P. Spear, endorsed the same as security thereon, and guaranteed the payment of the same.

5. That afterwards, and before the said note became due, the said Walter Ginnity endorsed, transferred, and assigned the same to the plaintiffs, who are now the lawful holders and owners thereof.

6. That the consideration for which the said note was given was property purchased and held by the said Frances Snow and Jennie P. Spear, as their separate estate.

7. That no part of the said note has been paid, wherefore plaintiffs demand judgment against the defendants, Frances Snow and Jennie P. Spear, for the sum of seven hundred dollars, with interest thereon from the third day of August, 1869, besides the costs of this action, and that the same be levied and collected out of their, or either of their, separate estate.

To this complaint the defendants, Frances and Henry Snow and Jennie P. Spear, demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer, and judgment was entered dismissing the action, and from this judgment the plaintiffs appealed.

Fleming & Daniel for Appellants.

The point made by the defendants on the demurrer and sustained by the court below was, that the note in question, being made by a married woman, and the maker not stating therein what particular separate property she proposed to

bind thereby, or to be responsible therefor, the same is void. In other words, that a married woman in this State cannot make a valid promissory note, except it is expressed therein that certain separate property of such married woman is intended to be bound thereby.

The act of March 6, 1845, known as the "Married Woman's act," (Thomp. Dig., 221-2,) provides that, "hereafter, when any female, a citizen of this State, shall marry, or when any female shall marry a citizen of this State, the female being seized or possessed of real or personal property, her title to the same shall continue separate, independent, and beyond the control of her husband, notwithstanding her coverture, and shall not be taken in execution for his debts; provided, however, that the property of the female shall remain in the care and management of her husband." And further, "married women may hereafter become seized or possessed of real and personal property, during coverture, by bequest, demise, gift, purchase or distribution; subject, however, to the restrictions, limitations and provisions contained in the foregoing section."

And the same act provides further, that "all property, real and personal, which shall belong to the wife at the time of her marriage, or which she may acquire in any of the modes hereinbefore mentioned, shall be inventoried and rccorded in the Circuit Court clerk's office of the county in which such property is situated, within six months after such marriage, or after said property shall be acquired by her, at the peril of becoming liable for her husband's debts, as if this act had not been passed; provided, that any omission to make said inventory and record shall in no case confer any rights upon her husband."

The married woman acquiring property by any of the means in the act above cited, except by distribution, takes by purchase, *i. e.* by her own act and agreement, (see Blackstone's Com., marg. p. 241,) and she is a necessary party to

the agreement or contract by which the title to the property is vested in her; therefore a contractor.

By the common law the wife could not acquire property, but to compensate for this disability, neither could she be held liable on contract. Upon marriage, her legal existence became entirely merged in her husband.

Under our statute, however, the wife not only holds her property, real and personal, of which she is seized and possessed at the time of marriage, "separate, independent, and beyond the control of her husband, notwithstanding her coverture," but she can acquire property by any of the means above stated, that is, by purchase, which is held by her in the same manner. She is a purchaser, and her title to the property separate, independent, and beyond the control of her husband; the husband having simply the care and management of the property. Thus the laws of our State recognize the separate existence of the wife as to acquiring and holding property.

Mr. Smith, in his work on Contracts, (4 Am. Ed., 317-18,) says: "It is a general rule that a married woman cannot bind herself by any contract made during coverture, not as in the case of an infant from any presumption of incapacity, but because she has no separate existence; her husband and she, being in contemplation of law, but one person."

And see also Chitty on Contracts, (10 Am. Ed., 194): "A married woman has, in general, no power or capacity to contract, so as to sue, or be sued, either with or without her husband, on her contract made during coverture, for she has in legal contemplation no separate existence, her husband and herself being in law but one person; and she is unprovided with the means of satisfying her engagements, her husband being entitled to her rights, and to any property she may acquire, even while living apart from him in a state of adultery. Her incapacity rests upon these principles, not upon the notion that she is under the control of her hus-

band during the coverture, and cannot, on that account, assent."

The common law basis the wife's incapacity to contract on the ground that she cannot hold property out of which her engagements may be satisfied, and because she has no separate existence apart from her husband.

Now, as our statute recognizes the separate existence of the wife in acquiring and holding property during coverture, and it is provided by the Code of Procedure, (under which this action is brought,) Sec. 220, par. 5: "In an action brought by or against a married woman, judgment may be given against her, as well for costs as for damages, or both for such costs and such damages, *in the same manner as against other persons,* to be levied and collected out of her separate estate, and not otherwise."

The right of the wife to purchase and hold property carries with it, in our opinion, the corresponding liability for the purchase-money or price of the thing purchased; and it will be borne in mind that the amended complaint sets up that the consideration for which the note, the subject of this action, was given, was property purchased and held by the said defendants, Frances Snow and Jennie P. Spear.

We cannot think that it was the intention of the framers of this law to offer a premium for fraud by permitting a married woman to become a purchaser, and at the same time render invalid her contract for the payment of the purchase-money, because she does not designate therein some particular separate property to be bound thereby.

The provision of the Code above cited is general, that the judgment against a married woman "be collected of her separate estate," and does not limit it to any particular separate estate which may be mentioned in the subject of the action against her. Nor is there anything in the married woman's act which would seem to imply that the Legislature intended to limit the wife's liability on her contract for

the purchase-money of her separate property to any particular property, or to render invalid her contract even as against the very property purchased, unless the same is specified in her written obligation.

Mr. J. B. Stickney for Respondents.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The basis of this action is the following promissory note:

"$700.00. ST. AUGUSTINE, August 3, 1869.

Twelve months after date I promise to pay to the order of Walter Ginnity seven hundred dollars, with interest, value received. FRANCES SNOW."

This note is endorsed:

"JENNIE P. SPEAR.
WALTER GINNITY."

This action is brought by Dollner, Potter & Co., the endorsees of Walter Ginnity, against Frances Snow as the maker of said note, and her husband Henry M. Snow, and against Jennie P. Spear, the plaintiffs alleging that she "endorsed the note at the time it was made as security thereon and guaranteed the payment of the same." Her husband is also a party. The plaintiffs allege that the consideration for which said note was given was property purchased and held by the two married women as their "separate estate." The plaintiffs pray judgment for principal and interest of said note against defendants, Frances Snow and Jennie P. Spear, "and that the same be levied and collected out of their or either of their separate estates." To this complaint the defendants, the married women, demur, the ground of the demurrer being "that the complaint does not state facts sufficient to constitute a cause of action."

This demurrer is sustained. There is judgment dismiss-

ing the complaint, and from this judgment this appeal is prosecuted.

The general question, therefore, presented by the pleadings is the sufficiency of the complaint. The decision of the question thus presented involves, to a limited extent, a consideration of the general subject of the rights and powers of married women under our constitution and statutes. This complaint is defective in that it fails to set up the character of the separate estate sought to be bound by the judgment. Both before and since the statute, there could be separate estate of the wife which, beyond question, could not be made subject to the promissory note of the wife. It is true that as to her separate estate the wife is considered in equity, for most purposes, as a *feme sole,* whether such estate was acquired before or since the statute; yet the common and necessary doctrine both in England and the United States is, that she is so only so far as the deed creating the estate makes her so. Any act against the terms of the instrument creating the estate by which the wife even consents to a charge, would be ineffectual for want of power to create a charge. Neither the constitution nor the statute prohibits the wife from acquiring, since their enactment,such a separate estate as was recognized and known before their existence. They did not in this respect restrict her power to become the beneficial subject of a settlement or grant made with such restrictions, powers and trusts, conformable to law, as the grantor might deem proper. If under such instrument the property was to remain in the care and management of her trustee, and she was to have the use of the rents, issues and profits thereof, the statute did not have the effect to transfer this management and the right to the profits to the husband. Now, this separate estate, which we see was authorized before as well as since the statute, was a creature of a court of equity to protect the wife against the marital rights of the husband.

It was an equitable estate. The legal title was in a trustee for the benefit of the wife. 4 Penn. State, 429; 4 Conn., 10. The law as to such separate estates, so far as it can be applicable to or arises out of this case, and beyond that point we do not go, is that the amount of the wife's promissory note, given for property purchased to be her separate estate, and for the direct benefit of such estate, is in equity a charge upon her separate estate, if such charge is consistent with the restrictions imposed by the donor or grantor as part of the terms of the gift or grant. As to such estates as we are now treating, this is the rule, whether the estate was created before or since the statute. In suits seeking to subject separate estate of this character, as remarked by Judge Comstock in Yale vs. Dederer et ux., 18 N. Y., 268, the trustee having the title is "an indispensable party." The trustee not being before the court, we cannot see how such separate estate can be effected or charged with this debt. 3 Ves., 443; note to 2 Story's Eq., 11 Edition, § 1396.

Again, in order to make out a charge against such separate estate, the complaint must necessarily set forth the deed or instrument creating the trust, or the nature and incidents of the trust estate, as upon its terms depends the power to create the charge. It is thus clear that this complaint fails to state facts sufficient to make this amount a charge against such separate estate, and that an indispensable party defendant is omitted to be made. Again, these plaintiffs fail to allege the present existence of any separate estate, and yet pray a judgment for a sum to be satisfied out of it. 31 Ala., 443; 26 Ala., 337; Voor. Code, 187, and cases cited.

What has been said is upon the hypothesis that the estate here sought to be bound is what is strictly known as the equitable, separate estate of the wife. Now the property which the wife may acquire is necessarily limited to two kinds, viz.: that in which she has an equitable title, and that in which she has the legal title and of which she is the

owner. What is before said covers and embraces all that property in which she may have an equitable title only, and that strictly and properly is her "separate estate," the estate which the plaintiffs here seek to charge. We might here cease the treatment of this question and dispose of the case upon the grounds before stated, but it is not deemed improper to briefly allude to the constitutional provisions as well as the statute upon this subject. The property which the wife acquires under the constitution (other than separate estate as before described,) and to which she has the legal title and of which she is owner, is called by the constitution her *"separate property."* The constitution did not propose, however, to divest the wife of a right to acquire a strictly separate estate, nor did the statute before the constitution render it impossible for the wife to acquire a separate estate, except upon the condition that it was to remain in the care of the husband, he to have the right to the hire and issues thereof. The purpose of the whole law is to give to the wife additional rights, not to destroy those before existing. She could take just such equitable interests as the deed gave, no more, no less. The statute regulated and controlled property in which title was in the wife at the time of marriage. It provided that *her title* should continue, separate, independent and beyond the control of her husband, not to be taken in execution for his debts notwithstanding her coverture, but the property was to remain in the care of her husband, and the wife was not permitted to sue him for the rents, hires or issues of property to which she had separate and independent title under the act. This must be restricted in its application to such property only as would, by virtue of the marital rights of the husband, have otherwise passed to him, or to his care and management—that is such property as to which the husband, by virtue of marriage, became entitled to ownership or control. The statute further provided "that married women may hereafter be-

come seized and possessed of real and personal property during coverture by bequest, demise, gift, purchase or distribution," not to be subject to the debts of the husband, but to remain in his care and management without liability to account. It also provided that the husband and wife should join in all sales, transfers or conveyances of the property of the wife, and that the real estate of the wife should only be conveyed by the joint deed of the husband and wife, according to the laws of Florida regulating conveyances of real property. The question whether the property of the wife, of which she was the owner at the time of her marriage, or acquired subsequently under the constitution and law, and which she owned and still owns, is subject in equity to be charged for her promissory, note has not been presented by counsel. An interesting question in connection with this subject is, what effect the restriction as to the transfer of the property of the wife, its management, and the right to the rents and profits thereof in the husband, has upon the general equitable doctrine applicable strictly to her equitable separate estate, in its application to her statutory separate property. Another interesting question is, whether the constitution repeals any part of the statute, and if so, the extent of the repeal and its effect upon the power of the wife to charge her "statutory separate property." The position taken by counsel in this case, if we understand them, is, that the wife having been given power to acquire property by purchase, carries with it a corresponding liability on her part for the purchase money; and that her contract (in this instance her promise to pay) is binding upon her. The constitution and statute do not enable the wife to bind her person, either at law or in equity, by contract, or subject her to be sued at law. 18 New York, 265; 37 N. Y., 35; 11 Casey, 385; 12 Harris, 80; 16 Ohio, 480; 39 Barb., 194; 46 Mo., 532; 23 Ala., 639; 22 Barb., 371; 9 Kan., 80; 8 C. E. Green, 526; 31 Ind., 233; 35 Ind., 353;

26 Texas, 685; 1 Green, 97-105; 6 ibid., 269-282; 13 Wis., 125; 15 Wis., 365-380. The power given to the wife in most of these States, the decisions of whose Courts are cited, is beyond that conferred in this State. The statute of Maine, like that of Florida, gives the wife power to acquire real estate by purchase, and we cite with approbation the language of its courts upon this particular subject:

"It is contended that inasmuch as the statute authorizes married women to become seized and possessed of real estate by purchase, it must by necessary implication authorize such women to enter into contracts of bargain and sale, and must also carry with it all the rights usually exercised by those making such contracts, including the right to make and execute promissory notes in payment of estate thus purchased. Such a construction would manifestly extend these statutory provisions much beyond the limits contemplated by the Legislature, and would overturn well-established rules of law defining the rights of married women. Purchase, in its most enlarged and technical sense, signifies the lawful acquisition of real estate by any means whatever, except by descent. There are six ways of acquiring title by purchase: 1, by deed; 2, by devise; 3, by execution; 4, by prescription; 5, by possession or occupancy; 6, by escheat. It therefore by no means follows that because the statute authorizes a married woman to hold real estate by purchase, that she must be authorized to pay the consideration by her promissory notes. The intention of the Legislature appears to have been to annul that rule of the common law by which the husband by marriage became the owner of the personal property of the wife, and entitled to receive the income of her real estate, and to protect her property by declaring it to be exempt from any liability for the debts and contracts of the husband. There does not appear to have been any language used in the act with a design to remove the disabilities imposed by the common law upon a *feme co-*

vert, and to enable her, contrary to its rules, to make sales and purchases of property. The notes referred to were, therefore, given by a person having no power to bind herself by such contracts, and are consequently void." 34 Maine, 572; 5 Wis., 245; 9 ib., 524; 9 Foster, 77; 15 N. Y., 575.

What is here said as to the purpose of the Legislature in the matter of the income of the real estate of the wife is not, as a matter of course, applicable to our statute, as in this respect our Legislature has expressed a different intention. What is said as to the power of a married woman to act as a *feme sole* in the matter of binding herself at law for her promissory note, is, however, correct beyond question.

The conclusion we reach, upon principle and authority, is that the wife's promissory note is not effective to bind her person either at law or in equity, and that neither the Constitution nor the statute give her to this extent the power of a *feme sole.* Whether her "separate property," under the Constitution and statute, or what is called by the books her "separate statutory property," can be charged with the amount of such note when given for a purchase of property to be her separate statutory property, is a question of too much importance to be determined, except after thorough argument, and in a case where the pleadings properly present that question. The allegation that the note was given for property purchased and held as separate estate, does not set up the present existence of a separate estate. In this case the existence of a "separate estate," or a "separate statutory property," is not averred. The complaint fails to make a case where a judgment can be rendered against either, as neither is alleged to exist. It will be seen, by consulting the cases (cited in note *d* to section 142, New York Code by Voorhees, page 187, and Wait's Code, 217,) upon the subject of the sufficiency of a complaint in a case of this character in New York, that this view is fully sustained by them. Indeed, they go much further than there is any

necessity for us to go in disposing of this case. These requisites, as to the sufficiency of the complaint in such a case, are not obviated by the provisions of the Code regulating the practice as to the manner of entering judgments against *femes covert*. The same provision is in the New York Code. This section of the Code (220) simply provides that where a judgment can properly be entered against a married woman, that as to the costs and damages recovered, the manner of entering the same in the judgment shall be the same as in other cases. It then provides that this judgment so entered shall be levied and collected of her separate estate. This section itself prohibits a general judgment at law against the wife, and restricts its operation to this property. As to the precise manner in which such judgments are satisfied we do not think it proper to state, as this question is not presented by this case. The judgment herein is final, sustaining the demurrer and dismissing the complaint. Generally the proper order to be made herein, under the circumstances, would be to sustain the judgment without prejudice to the parties filing a bill in equity under the new practice. As, however, there would arise some questions as to the limitation of the action, the proper order, we think, is to affirm the judgment in so far as it sustains the demurrer, and to reverse it in so far as it directs the complaint to be dismissed, and to remand the case, with directions to permit the plaintiffs to amend upon payment of all costs in the Circuit and Supreme Courts, including the cost of such motion.

The judgment is reversed in so far as it directs the complaint to be dismissed, and the case will be remanded with directions to permit such amendments as are proper upon the payment of all costs, and there will be judgment in this court against appellants for all costs by respondents expended in this behalf.

BENJAMIN CHANDLER, APPELLANT, VS. GEORGE W. SHERMAN, APPELLEE.

1. It is the duty of a partner, to whom is entrusted the management of the books, to keep precise and accurate accounts of all his transactions for the firm. He should have the books always ready for inspection and examination, and his conduct should be consistent with fair dealing and good faith.

2. One partner may exercise such powers and make such contracts as are appropriate to the business in which the parties are engaged, and within the customs and commercial practice thereto appertaining. A contract clearly beyond such powers, customs and commercial practice, cannot be sustained as against the firm, unless it is made with the consent of the other partner. Hence, where the aggregate amount of the capital contributed by two partners is the sum of $16,000—one contributed $9,000, the other $7,000—neither partner has authority, without the assent of the other, to borrow the sum of $2000 from a third party, agreeing to pay therefor twenty-five per cent. of the net profits of the concern. Where, in such case, the one partner avers the assent of the other, he is held to strict proof of same.

3. Two partners agree that either of them may take a certain proportion of the property, within a fixed time, at a certain valuation. This contract being executed by one of the parties taking possession within the time fixed, the other cannot insist upon the price which the partner taking the property received for it from a third party. He is restricted to the agreement.

4. Where the firm has purchased the interest of a third partner, and has paid a large proportion of the purchase-money, the managing partner of the concern cannot, without the assent of the other partner, debit himself in the accounts of the new firm with its debt to the retiring partner, and claim a proportionate share of the assets of the old firm. The balance of the debt to the retiring partner is a debt of the new firm, and the account must be so stated. Even if the retiring partner has accepted the managing partner as his exclusive debtor for the balance, the managing partner would be entitled to nothing more than such credit as would follow the payment of an ordinary debt of the new concern.

5. In the absence of a special agreement, one partner's accounts with the firm cannot be charged directly against his contribution to the capital, the other partner's individual account being charged up in his general

account with the firm. The same rule must control in each case. The proper rule is to charge each sum in the individual account with the firm.

6. Five dollars per day is not an exorbitant or unusual allowance for the services of an accurate, competent and industrious accountant and master. The Circuit Court having found the time employed, and there being no satisfactory testimony to the contrary, this Court must approve such finding. It is the duty of the Judge to see that he does not allow for more labor than has been properly performed.

7. Where neither partner is blameless, the costs should be divided among the parties in a suit for dissolution and an account.

Appeal from the Circuit Court for Escambia county.

Sherman was complainant in the cause. The facts of the case are stated in the opinion of the court.

A. E. Maxwell and *W. A. Blount* for Appellant.

G. A. Stanley for Appellee, Sherman.

C. C. Yonge and *G. P. Raney* for the Master.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a bill brought by one partner against another for dissolution and account. The bill alleges the formation of a partnership for the purpose of prosecuting the business of sawing lumber; that the business was carried on for some time, when the mill was destroyed by fire; that upon its destruction plaintiff advised defendant that he was unwilling to continue the business longer, and requested that the business be wound up, and a statement had, to which request defendant refused assent; that shortly thereafter he (the defendant) left the State, and upon his return found that the defendant had taken possession of the property and mill site, and had formed a new copartnership with other parties, excluding him from any participation therein; that defendant refuses to come to an account as to the partnership transactions. Plaintiff prays for dissolution, for an ac-

count, and for a decree for whatever may be found due him. Defendant interposed a demurrer to the bill. This demurrer is overruled. Defendant then filed an answer denying the charges of exclusion, of refusal to account, of all improper conduct, and submitting to and requesting an account between the parties. There was an interlocutory decree for reference to a master to state an account.

To the report of the master there were exceptions by defendant, and there was also objection to the amount allowed to the master for his services by the court. Some of these exceptions were sustained by the court, the master's charge was allowed, and there was a decree against the defendant for the sum found due to plaintiff, and for all costs.

The first ground of appeal is the judgment of the court overruling defendant's demurrer to the bill. Waiving the question whether pleading over after this judgment upon the demurrer was not an abandonment or waiver, it is clear that the demurrer was properly overruled. The principal and necessary instrument by which the business was to be conducted (the mill) was here destroyed. As to the remaining property, the allegation is that it was taken possession of exclusively by the defendant, and was being used in other enterprises not connected with the joint interest of the parties. The plaintiff also alleges a refusal to account and the refusal of the defendant to give him access to the books of the concern. It is unnecessary to cite any authorities to show that these facts canstitute a ground for a decree of dissolution and for an accounting.

The next ground upon which a reversal of the decree is sought is the judgment of the court overruling the exceptions of the defendant to the master's report, and the allowance of five hundred dollars as compensation to the master.

The first exception of the defendant to the report of the master was "because of the refusal of the master to allow a credit of $3000 to him for that amount paid Mrs. White-

sides on account of the firm, as shown by the evidence." The decree of the court as to this exception was that it be "sustained so far as to allow interest on the sum of two thousand dollars borrowed from Mrs. Whitesides by the respondent, at the rate of eight per cent. per annum from the time the same was borrowed until payment of the same, instead of the allowance for interest claimed by respondent." The testimony upon this matter is substantially as follows:

George W. Sherman, the plaintiff, states: "After my return from Virginia after the mill was burned, and about the third of September, A. D. 1872, I met Mr. Chandler, the defendant. I requested a settlement. He said he had used my money, but would have it in a short time. I waited for three months. I called on him at his house. He said he wanted to call my attention to a matter. He asked if I recollected his having borrowed $2,000. I told him I recollected a conversation that passed between us at the time he said he borrowed the money. I asked him to let me have the books; he said you can't have them; I demanded them. He replied you shan't have them. It was the agreement in the copartnership that he should have the control and custody of the books. I knew nothing of book-keeping. He never asked me to come to an account. I told him I wanted the books to have them posted. Mr. Chandler subsequently, and after the commencement of this suit, placed the books in the hands of my attorney." When asked what occurred between him and Mr. Chandler as to the alleged loan of $2,000, he says: "Sometime in 1868, when we had been running the mill about three weeks, he said he had found out where he could get some money. He could get some from Mrs. Whitesides. I asked him what per centage. He said she agreed to lend it to him for his accommodation. He did not tell me what per centage. He asked me should he take it. I asked him if we needed money. He said yes, very badly. I then said if we could get the money at any

reasonable per centage we had better take it. Nothing was said at that time, or at any time prior to the burning of the mill, about one-fourth of the net profits as interest on the money. The first I ever heard of this was at his house, after my return from Virginia, and after the mill was burned. He said nothing about borrowing on his own responsibility. I understood he was to get the money for the firm. The mill could not have been started without the use of some money at this time. Neither at that time nor at any time before did he say anything further as to the loan of $2,000, or that the firm was hopelessly embarrassed. At no time, until I visited Mr. Chandler at his house after the mill was burned, did Mr. Chandler inform me what per cent. was to be paid for the $2,000. I don't know who repaid this money to Mrs. Whitesides, or that it ever was repaid. Mr. Chandler attended to the financial part of the business; I left it to him entirely. Mr. Chandler said he had paid it with one-half of an undivided half of a tract of land that was owned by Mrs. Whitesides and himself. I was at no time advised of the valuation at which Mrs. Whitesides agreed to accept this land in payment of the debt due her; I only know what Chandler told me. Mr. Chandler, after the burning of the mill, fixed the net profits at 20 or $25,000, and claimed one-fourth of it. We had several conversations in reference to the matter of settlement. No adjustment of the books was made prior to that by Jordan. At no time did I consent or agree that Mr. Chandler should borrow money of Mrs. Whitesides or any other person, the firm to pay twenty-five per cent. of the net profits made by the mill. When the conversation occurred between us on this subject, I think the mill had been burned for two or three weeks. I do not know at what rate money could have been borrowed at the date of this loan, or that it was difficult to borrow it at any rate of interest. I would have preferred to stop the mill at the time than to have paid a heavy interest.

The prospects of the profits of milling were not in my judgment such as to justify it. I would have paid one per cent. per month, but not 1½. Mr. Chandler said that the mill was embarrassed financially at that time. The use of this money enabled the concern to relieve itself of embarrassment. When the mill was burned we were about easy. At one time after the mill had stopped, Mr. Chandler had a conversation with a man from Kentucky about some money. After he left Mr. Chandler said to me, 'What do you suppose that man wants for his money?' I said I do not know. Chandler said he wants 25 per cent. of the net earnings of the mill. He must think I am a damned fool. He would own the mill in three years."

Robert Jordan, for the plaintiff, swears that he was the book-keeper of the concern from about February, 1869, up to the time when the mill was burned, and that he was employed in May, 1872; that on May 21, 1873, he made out a statement showing the real assets and liabilities; the partners placed the books in his hands to make a statement of the real assets and liabilities of the firm as a basis of settlement. There was at this time no charge on the books against the concern for $3,000 due Chandler for interest. In the month of May, 1873, such a charge is entered in the handwriting of Mr. Chandler. At that time there were no outstanding liabilities of the firm other than stock liabilities. At the time this statement was made, Mr. Chandler claimed interest on money advanced the firm. I can't say that Chandler at that particular time spoke of it as money borrowed by him for the firm on which he claimed the interest. At another time he spoke of having borrowed some money on which the firm was to pay a large interest. I do not think Mr. Sherman was present at this time." When asked whether he knew of any $2,000 borrowed by Mr. Chandler for the firm, he states: "I know he borrowed some money, but do not recollect the exact amount. I don't think I was

ever called upon to enter $2,000 to the credit of Mr. Chandler. I do not recollect of ever having heard, prior to the burning of the mill, of any agreement by Messrs. Chandler and Sherman to pay a party twenty-five per cent. of the net earnings of their mill business for the use of $2,000 loaned them, but have heard so much about it since that I am not prepared to swear that I did not. Previous to February, 1869, the mill stopped operation from embarrassment. The firm was in debt about $5,000 in February, 1869. The mill had been in operation a short time. The mill had been leased for twelve months before that time on account of financial embarrassment. Mr. Chandler gave me the money to commence operations. I do not know where it came from. The ledger shows $3,068.94 as paid into the concern by Chandler between January 1st and April 19th, 1869."

J. D. Wolfe for the plaintiff:

He is asked to state what occurred between him and defendant after the matter in controversy was placed in his hands by Mr. Sherman. He answers: "I sent for Mr. Chandler, who came. I told him that nothing could be done until I had an opportunity of examining the books. He said he would bring them. He did bring them, a ledger and journal. After examining the books and balance sheet as made out by Mr. Jordan, I told him that I saw no reason why the matter could not be settled, and proposed to him an amicable arbitration, which he assented to, but said that he was going up to Choctawhatchee and would take the books with him, and when he came back he thought we would settle it ourselves. There was no mention made by him of $3,000 for interest, or any other claim outside of the books as they then stood. After a considerable length of time he brought the books back, and then for the first time I heard from him this claim about interest. I told him at once that I could not allow it without a contest. He then

refused to arbitrate. Upon an examination of the books, I found a number of entries beside the one for $3,000 had been made by Mr. Chandler after I gave him the books. I immediately brought suit, and upon application made to me by Mr. Chandler for the books I told him that under instructions from my client, as the case then stood, and in view of the entries he had made, I could not deliver him the books. The following, as near as I can recollect, are the additional and new entries." The witness then gives some entries. It is only necessary to insert one here as bearing upon this exception:

"To B. Chandler—Am't paid on money borrowed, $3,000."

Benjamin Chandler, the defendant for the defendant, swears: "The partnership of Chandler and Sherman was formed in January or February, 1866, Hale, Sherman and myself being the partners. I obtained the loan of two thousand dollars from Mrs. Whitesides, upon pledging one-fourth of the net profits of the mill until repaid. I advised with Mr. Sherman for days, I think weeks, in reference to the matter. I told Mr. Sherman about the terms, viz: twenty-five per cent. of the net profits. He consented to it, and said it was better than paying a heavy fixed interest. He urged me to make the loan. We ran the mill successfully after that nearly two and a half years, paying off its old debts and leaving a surplus. The book-keeper estimated that we had $12,000 after paying all debts, consisting of cash, lumber, and debts due the firm. I repaid the money borrowed from Mrs. Whitesides. I paid $5,000. I claim $8,500. This is made up of the estimate of one-fourth profits of the mill and the two thousand dollars borrowed from Mrs. Whitesides. I had already been credited with the two thousand. I had full conversation with Sherman upon this subject. I remember distinctly that he asked me if I would not be satisfied with legal interest. To which I replied no; that I had purchased the claim in good faith and

expected all that it would yield me. This all occurred before the middle of January, 1873. About the latter part of March or April I told him that upon a proper settlement between us I was prepared to pay him anything that might be due upon the basis of my having credit for the proceeds of the loan obtained from Mrs. Whitesides. To this he objected, and the interview ended." There is not written evidence of any agreement with Mrs. Whitesides. This witness being asked, "why did you enter a credit to yourself of three thousand dollars in the Whiteside transaction at the time you did, although you claimed more?" answered: "After Mr. Wolfe had the settling of this business for Mr. Sherman, he sent for me to talk on the subject. He said he thought there would be no difficulty in our arriving at an adjustment of the business, and in speaking of the loan we made he said I would be entitled to all I had paid for the loan and no more. Wishing to get the matter settled without a suit, I determined to accept the amount I had actually paid for the claim, trusting that that would lead to a settlement without a suit, and concluded to accept the $3,000 as interest, and entered it in that way on the books; but I believe that I was fully entitled to the quarter of $25,000. The matter of difference between us had been as to what should be charged on that account. It was after Mr. Sherman had placed his business in the hand of an attorney that the entry for three thousand dollars interest was placed by me to my credit in the books of Chandler, Sherman & Co., about one or two weeks before legal notice of suit was given me." *Question*—"You have heard Mr. Wolfe's testimony: leaving out the $3,000, state whether the entries referred to are correct, and the amounts properly charged and credited? *Answer*—They are. *Question*—State when and under what circumstances you made all these entries, including the $3,000? *Answer*—The entries were made after having had several interviews with Mr. Wolfe on the

subject of a settlement, and with a view of having every necessary entry made before I exhibited the books to Mr. Wolfe, expecting that that would be a basis of settlement from what had previously occurred between us." This witness states further, that when these entries were made Mr. Wolfe had never seen the books: "After I carried the books to Mr. Wolfe, I never had them in my possession. I state positively that I never had these books in my possession after I placed them in Mr. Wolfe's hands." As to the value of the land which the witness states he exchanged with Mrs. Whitesides for her claim against the firm, he says: "I repaid Mrs. Whitesides the $2,000 by the sale of a tract or parcel of land in Tennessee, on the top of Lookout Mountain. I considered the land worth the sum of $5,000; I had held it at $6,000. It was about 100 acres of unimproved land. I had a joint interest with Mrs. White sides. I purchased the land of Spencer Rogers in connection with other property. I paid for the whole between thirty and forty thousand dollars, money due me by Mr. Rogers. The whole tract was estimated at 500 acres. My agreement to sell this land to Mrs. Whitesides was made by written correspondence. It was a place of great resort in the summer, there being a large hotel near it. The land commanded a most beautiful view from the top of the mountain, being eligible for building sites. It joined what was called the hotel lot. The land is comparatively level. I do not think it worth what I gave Rogers. I gave him that on his own debt, because I could get nothing else. Mrs. Whitesides told me she had conditionally sold this land for as much or more than she paid me for it." This witness states that while he was in no way connected or related to Mrs. Whitesides, yet that there was a particular friendship existing between himself and her, as his wife and she were brought up together. He states also that the evidence of indebtedness given to Mrs. Whitesides was letters

which passed between them in regard to it, and that he cannot remember whether these letters contain the evidence of the amount of the loan and the rate of interest, as the negotiation was made partly through her daughter, who was then at his house, and that there is no written evidence of this agreement that he had any knowledge of. Under this evidence and the entries in the books, the court found that defendant Chandler was entitled to a credit for the sum of $2,000, the actual amount borrowed from Mrs. Whitesides for the firm, allowing interest thereon from the time the same was borrowed to the date of payment.

The ground of Chandler's exception is that the court failed to allow him a credit of $3,000 interest on this sum, the interest he claims to have paid Mrs. Whitesides; at the same time claiming that he was really entitled to $2,000, the amount of the loan, and to $6,500, which he says was a quarter of the net profits. Laying aside the claim for $6,500, which is not insisted upon, we must say that $3,000 interest on a loan of $2,000 for two years and six months is very extraordinary, and is entirely outside of a regular or usual course of dealing. Sherman swears that he gave no authority for the payment of such interest, and that all that he did was to consent to borrow the money at a reasonable rate of interest. No entry of it appears upon the books of the parnership until long after the operations of the firm had ceased. Wolfe says this entry was made by Chandler after the books had been in his (Wolfe's) hands as attorney for Sherman, and when a suit was imminent, that Chandler in his conversations with him made no claim of $3,000 for interest, or any other claim outside of the books. The person who was the book-keeper of the firm during the time the loan was made cannot say that he recollects any such loan, and Sherman swears that Chandler made no such claim until after the mill was burned. In May, 1873, this book-keeper makes out a statement of the

real assets and liabilities of the firm at the request of the parties, and no charge against the concern for the sum of $3,000 for interest was on the books, nor did Chandler then insist upon its being placed in this statement. Chandler, on the other hand, swears that this contract to pay a quarter of the net profits was made by him with the consent of Sherman; denies positively Wolfe's statement that the $3,000 entry was made as he states, and affirms that he paid Mrs. W. the $5,000 by conveying to her his interest in a tract of land estimated to be worth that sum. He states further that the evidence of the debt due to Mrs. Whitesides was letters which passed between her and him in regard to it; that he cannot remember whether these letters contain the evidence of the amount of the loan and the rate of interest, as the negotiation was made partly through her daughter, who was then at his house, and that there was no written evidence of this agreement so far as he knew.

Under this evidence, the court very properly restricted the credit of Chandler to the actual amount of the loan, with interest thereon, as shown by the books before this dispute originated. An elementary principle resulting from the confidential relation of partnership, invested as each partner is with power which may involve the estate of all, is that it is the duty "of each partner to keep precise accounts of all his own transactions for the firm, and to have them always ready for inspection and explanation." The law requires fair dealing and the utmost good faith between parties occupying such confidential relations. This is a leading principle, controlling the action of the courts in such cases.

Chandler was the active business manager of the firm. Sherman was unfamiliar with book-keeping, and left the whole matter to him. Upon the books kept by him and under his control at the time this difference commenced was

an entry of $2,000 to his credit. This was the amount admitted by him to have been received of Mrs. Whitesides. How it was paid, if it was paid otherwise than in cash, is not disclosed by the book, and the necessary result of the entry made by him or under his supervision was that he was entitled to a simple credit for this amount with interest thereon. This the court has given him, and under the circumstances of this case he should have no more. Sherman denies positively Chandler's authority to make any loan, except at an ordinary rate of interest. The books show nothing more. Chandler's evidence being in conflict with both the books and Sherman's testimony, as well as with the statements of Wolfe as to the entry of 3,000, it should be rejected. The court did not believe in the existence of the Whitesides contract; or if it did believe in its existence, it did not think it *bona fide;* or if it did believe in its existence, and that it was a contract made in good faith, then it held that it was beyond the power of Chandler, without the assent of Sherman, thus to bind the firm. We do not see where the court erred if it entertained either of these hypotheses. Chandler himself, when interrogated closely, knew of no written evidence of such contract, and states that the business was transacted partly through the daughter of Mrs. Whitesides, who was an intimate friend of his family, residing then with them; and the evidence shows conclusively that Chandler, when in debt and embarrassed, made false entries of credits of stock to Mrs. Whitesides in order to protect his interest in the mill from his creditors.

Again, one partner may, for the firm, do such acts and exercise such powers as are appropriate to the business in which the partners are engaged; but such excess in the exercise of power and authority as involves an act which is neither appropriate to nor within the customs appertaining to the particular business in which the partners are engaged, will not bind the firm under the circumstances of this case.

According to Chandler's construction of this contract, Mrs. Whitesides was to have twenty-five per cent. of the net profits during the continuance of the partnership; for that is his claim. Her interest was to vary according to the amount of the net profits, while the principal sum was to be a loan. This was really allowing a greater interest in the net profits than would have been the sum coming to her had she been admitted a partner, to share according to her contribution. Such a contract is beyond the power of a managing partner. 14 John., 318; 1 Whar. (Penn.), 380; 16 La. An., 418; 20 Ind., 110.

Chandler contributed to the capital here the sum of $9000. Sherman the sum of $7,254, and by this contract, if sustained, Mrs. Whitesides, for a contribution of $2,000, is to have one-quarter of the net profits resulting from the use of over $18,000. While one partner, it is true, may borrow money for the firm, still such borrowing must be upon terms in some manner corresponding to the customs and usages of the particular business according to usual commercial practice. There must be some limit, and if there is any, which no one doubts, then this case is certainly beyond any reasonable limitation.

This disposes of the first exception.

Appellant's second exception to the master's report is "because of the charge made by the master against him of $5,000 instead of $3,000, as the purchase price of the mill property, according to agreement between Sherman and Chandler." This exception was overruled by the court, and this action is here for review. The testimony as to this matter is as follows:

Plaintiff Sherman testifies "that Exhibit C. is the agreement executed by Chandler and himself as to the matter therein mentioned. This agreement is as follows:

"Agreed by the undersigned, to be confirmed by the other partner, that either partner shall have the privilege for sixty

days of taking on his own account the following property, belonging to the firm of Chandler, Sherman & Co., viz: the water front purchased from Blount & Knowles, with the improvements thereon, together with all of the machinery, boilers and scrap iron now on the premises; also, four lots purchased of R. L. Campbell, and one arpent lot purchased at mortgage sale from Holmes, being arpent lot number 83, in Pensacola; also the cart and mule now belonging to said firm.

"B. CHANDLER,
"GEO. W. SHERMAN.

"August 31, 1872.
"Witness:
"WILLIAM GOULDING,
"B. F. FAUST."

"This agreement was made one day before I went to Virginia. The property was to be taken at the valuation of $3,000. I had not urged a final settlement before I went to Virginia. My understanding and agreement with Mr. Chandler was to put in the mill site at $3,000, he to make an immediate settlement and pay me my money. I would not have valued it at $3,000 if I had known there was to be a credit. I was absent, in Virginia, two months. I returned the third of November. I was in Virginia or on my way here at the expiration of the sixty days. I do not know that this agreement was ever confirmed by the other partner. It was my understanding that when the business was settled, any balance coming to me was to be paid. Mr. Chandler did not, within sixty days after thirty-first of August, notify me that he would take this property. I do not recollect that Mr. C. advised me that he had taken possession under that agreement; when I returned he was at work on the mill for himself, in possession of the property, and I made no objection to his operations."

Defendant and appellant Chandler testifies that when the agreement (Exhibit C.) was made out, not a word was

said about this being done on condition of an immediate settlement. The balance of the evidence here shows the valuation at which this property was put into another firm by Chandler after he had taken possession of the same. It is unnecessary to insert it, or to say more than that the valuation was $5,000 instead of $3,000, the valuation agreed upon between Sherman and Chandler.

Sherman's position here is that this contract and agreement was based upon the condition of an immediate settlement; that Chandler came to no such settlement; that the property for that reason remained partnership property, and that Chandler should be charged for it the amount that it was valued at when he entered into the subsequent firm with a different party. Upon the face of this agreement, coupled with the admitted understanding as to price, we can see no room for doubt as to the proper conclusion to be reached. Either party was "to take" the property "on his own account." He was to have this privilege for sixty days. Chandler did so take it, and he is to be charged on his own account the sum agreed upon, and no more.

There is nothing in this agreement as to an immediate settlement of accounts between the parties and the payment to Sherman of "his money." Indeed, in one place, Sherman in his testimony, says: "Before I went to Virginia (which was the time when this agreement was executed) there had been no request or urgency on my part for a final settlement of the partnership business." After the expiration of the sixty days, and when Chandler had taken possession, Sherman, who in the meantime had been absent in Virginia, returns. He finds Chandler, as he says, in possession of this property "for himself." He states that he made no objection. The contract was executed, and Chandler, under his agreement, took it "on his own account." He is properly chargeable with the sum of $3,000, and no more.

The third exception was sustained by the court, and neither party objected here to its action in this respect.

The fourth exception, which was overruled by the court, was "because of errors in treating the assets of the firm not as assets of Chandler, Sherman & Co., but as belonging in equal shares to Chandler and Sherman, and in allowing Sherman an interest in the partnership share of Wortham, which was the individual property of Chandler by purchase from Wortham.

This exception is based upon the hypothesis that Chandler, having purchased one-fifth of the interest of a third partner, the four-fifths having been purchased by the firm of Chandler and Sherman, he must stand in reference to that interest in the same situation as the third partner would if he had reserved one-fifth of his interest in the partnership, and that the account should have been stated as an account with Chandler, Sherman & Co., there being this outstanding interest of the third party, before then being one of the firm. The entry of the master here is a credit to Chandler of $500, "to be paid Wortham." Chandler and Sherman are charged with this sum by the master as a debt due by them to Wortham, which Chandler had assumed, and Chaudler gets a credit for it in his account with Chandler and Sherman. The question here is, was this purchase of the interest of Wortham made by Chandler and Sherman, or was it an individual purchase of Chandler? If this purchase was made by the firm, then Chandler is entitled to no credit for the firm debt. It is unnecessary to go into any lengthy and detailed statement of the evidence upon this subject. It establishes that the purchase of the interest of Wortham was made for the firm; the firm paid $2,000 upon it.

It seems to have been an after thought of Chandler to make himself the owner of the remaining one-fifth interest by attempting to assume the balance of the debt of the firm

without the assent of his copartner. There is nothing in this record which shows that Wortham has accepted Chandler alone as his debtor, or that Sherman has consented to such proposition. The sum to be paid Wortham is a debt due by the firm, and not a debt "to be paid" by Chandler. Chandler cannot thus at will and pleasure assume debts due to others by the firm, when such action may, in his judgment, give him, without even payment, an advantnge against his copartner.

The fifth exception is "because of error in Exhibit H. in the several items therein debited to Chandler, especially in items 1, 2, 3, 6, 8, 9, 10, 11, 12, 13, 19, 20, 21, and the interest item, and because of error on the credit side of said account of $500 to be paid to Wortham." This exhibit is Chandler's individual account with Chandler & Sherman. It appears from the evidence that the sum total of Chandler's private account was $3,545.22, and that of this $2,058.93 was charged against the stock account of Chandler, and $1,486.29 was charged to his individual account. All of Sherman's individual account with the firm is kept separate from his stock account. In the absence of a special agreement to that effect, this difference in the treatment of accounts of partners cannot be sustained. The proper entry for this indebtedness of each party is in his individual account with the firm. It is no proper charge against the stock account of either party. The second item is a charge of Chandler for $309.75, and a credit of stock account with that sum. This item originates in this way: The original stock contributed by Chandler was $9,003.18; the stock contributed by Sherman was $7,254.00. Chandler was charged with $2,058.93 (which was his individual account) in stock account, thus reducing his stock to $6,944.25 Sherman's individual account was not charged to his stock, and there was, therefore, a difference in the stock accounts of the parties of $309.75. All of this is wrong. The indi-

vidual account must be kept separate from the stock account. The only question here is, whether the interest of these parties in the concern was equal, or whether they were to share according to capital contributed? If it was to be an equal copartnership, notwithstanding a difference in the amounts contributed, then there is a simple division of the excess, charging each individual in his account with the firm with the advances received. If the share was to be in proportion to capital contributed, then the distribution is to be made with reference to that view. As this case must necessarily be remanded, all of this matter may be considered and the necessary charges in the account made. The next item in this account to which appellant excepted was item 6. This charge made by the master is for a "collection on account of Holmes' lot, $339." It appears from the evidence that this lot was received from Holmes by Chandler for a debt due by Holmes to the firm. It was, therefore, simply an asset of the firm. Chandler subsequently purchased it under his agreement. This item must be stricken out as a charge against Chandler. Item 8 is for a "collection as follows, from B. F. Simmons, $500." It is a proper charge against Chandler. He admits that it was settled in full, and does not deny that this settlement was by him, and when asked what accounts Sherman collected, restricts Sherman's collection to one account (Avery's). Item 10 is for amount collected of J. W. Chandler, and is upon the same footing as item 8. The interest item, $756.66, is interest upon $5,000, being what Sherman claims of Chandler for mill site, &c. (See what is said as to this matter under second exception.) Chandler is probably chargeable with $3,000 in this matter, and the interest must be upon this sum. The next exception is to a charge for interest on $2,697.30 for two years. The ground of the exception is that this sum is the aggregate of many sums collected by Chandler at various and different dates, and that interest

should be charged upon each item and not upon this sum total. This view is correct. The master should have charged interest on each sum as collected, wherever interest was properly chargeable. The next and only remaining matter for consideration here is the action of the court in allowing five hundred dollars to the master in adjusting these accounts. To this allowance the appellant objects. This matter must be settled by the evidence. We do not deem $5 per day an extravagant charge for the services of a good, competent and accurate master and accountant. The books were accessible to the Judge of the Circuit Court. The question as to the actual employment of 100 days in this labor by the master was before him, and he found as a fact that such time was necessary to the examination of the books and the statement of the account. After careful consideration of the evidence upon the subject, we can see no ground to authorize a deduction in the charge. It is the duty of the judge to be careful that he does not allow for more labor than has been properly performed. Under this evidence we cannot say that the labor charged for was not performed. These costs, however, should be borne equally by the parties. Neither are blameless in this proceeding. Such is the rule in this State, (5 Fla., 503; 11 Fla., 234,) as well as in other States in cases of this character. 3 B. Mon.; 2 Dev. Eq., 221; 1 Eng. Chy., 213-219.

The decree is reversed, and the case is remanded with directions to cause the master to restate the account between the parties in accordance with this opinion, and for such further proceedings as are conformable to law; and it is ordered that the allowance to the master is affirmed, and that the costs in this court and in the circuit court be equally taxed against the parties to this controversy.

CALEB W. LORING, APPELLANT, VS. DUNNING & PALMER, ET ALS., APPELLEES.

1. It is not a good answer to a creditor's bill that the liability of one of the defendants as a special partner was limited by the articles of co-partnership. Such plea should be made, if at all, when the original suit was brought. The judgment fixed the liability.

2. Mere inadequacy of price in the sale of the property of one in embarassed circumstances is not evidence of fraud as against creditors, but a sale of property of the value of fifteen to twenty thousand dollars for an indefinite sum, (no price being agreed on,) paid or to be paid, not exceeding $5,000, under circumstances showing that the purchase was made at the solicitation of the seller and because of her pecuniary embarrassments, and the intention of the purchaser to give the grantor and her family the benefit of the proceeds of the property over and above the purchase money, will warrant a decree that the conveyance was fraudulent on the part of the grantor, and that as to the grantee it be held to be a security for the amount advanced by him to or for the benefit of the grantor.

Appeal from the Circuit Court for Putnam county.

The complainants, Dunning & Palmer and F. S. Selover & Co., filed, August 15, 1874, a bill in chancery against Sophia R. Carr, John T. Carr and James W. Allen, then lately partners doing business in St. Johns county, under the firm name of B. E. Carr & Co., and James Burt, trustee, George Burt and Caleb W. Loring in behalf of themselves and other creditors of B. E. Carr & Co.

The bill alleges that Dunning & Palmer on June 6th, A. D., 1873, recovered a judgment against the defendants, B. E. Carr & Co., in the Circuit Court of Duval County, for the sum of $1295 and 30-100; that on the 6th day of June, A. D. 1873, T. S. Selover & Co. recovered judgment against said B. E. Carr & Co., in the same court, for the sum of $498 and 68-100; that both of said judgments were duly docketed in the county of Putnam; that afterwards executions were duly issued upon both said judg-

ments and delivered to the sheriff of said county of Putnam and they have been duly returned to the clerk's office of said county unsatisfied, with the return of said sheriff thereon that no property can be found belonging to said defendents, B. E. Carr & Co., or to any one of said defendants, subject to be levied upon and sold under said execution; that neither of the defendants are seized or possessed of any property in their own name liable to legal sale under said execution; that prior to the recovery of said judgments, the said defendants, under the firm name aforesaid, carried on the business of merchants and traders in St. Augustine, in the county of St. Johns aforesaid, and that said judgments were recovered for goods, wares and merchandize sold and delivered to them; that by the terms of the articles of copartnership under which said defendants carried on the said business, the defendant, Sophia R. Carr, had the control and direction of the business of said firm, and that in the purchase of goods and management of the business of said firm she had, under said articles, a controlling interest and voice; that the complainants sold and delivered the goods, wares and merchandize to the defendants upon the credit and financial responsibility of the defendant, Sophia R. Carr, and at the request of said Sophia R. Carr as one of said firm; that complainants had been informed and believed prior to the sale of said goods by the defendants and by said Sophia R. Carr, that the said Sophia R. Carr had a large income from property held in trust for her general use and benefit, both in the State of Florida and in the State of Massachusetts, and that such property so held in trust, or the income thereof, or both, would be ample security for, and liable and subject to the payment of any obligations or judgments against said defendant, Sophia R. Carr, and reposing confidence in the credit of said Sophia R. Carr, arising from said trust estate, they sold and delivered said goods, wares and merchandize

to the defendants; that Sophia is the widow of Burrough E. Carr; that said Burrough E. Carr died intestate some time prior to the formation of said firm of B. E. Carr & Co., and prior to the sale and delivery to defendants of goods, wares and merchandize; and that for several years subsequent to the death of said Burrough E. Carr, the said Sophia received her support and maintenance chiefly from the business and goods and merchandize of said firm of B. E. Carr & Co., and not out of the trust estate hereafter set forth; that the defendant, Caleb W. Loring, is a brother of the said Sophia R. Carr, and holds in trust in the State of Massachusetts for the said Sophia a large amount of valuable real and personal property, and that the income thereof by way of rents and interest, or otherwise, is largely in excess of the necessary and proper expenditures for the support and maintenance of the said Sophia; that the defendant, James Burt, is a trustee, as hereinafter stated, for the said Sophia, and as such trustee is seized in fee and has the possession of a large quantity of valuable real estate in the town of Palatka, Florida; that on or about the 13th day of March, A. D. 1852, one Robert R. Reid and Mary, his wife, of Palatka, and Burrough E. Carr and Sophia, his wife, and and George Burt, and Lucy, his wife, of St. Augustine, sold and conveyed by deed in fee unto one Isaac H. Bronson, as the party of the second part, about twelve hundred acres of land situated in and about what is now the town of Palatka.

That on the 22d day of March, A. D. 1852, as complainants are informed and believe, the said Isaac H. Bronson duly made a declaration of trust under the deed aforesaid in favor of the said Sophia R. Carr and Lucy Burt, whereby the said Sophia and Lucy were declared the *cestuis que trust* of said property conveyed to the said Isaac H. Bronson; and the said Bronson promised and bound himself to manage and control said tract of land under certain restric-

tion, and to pay over to each of the said *cestuis que trust* or beneficiaries, or to their heirs and assigns, one-third of the net proceeds arising from said lands, either by sale or otherwise; that said declaration of trust has never been recorded in said Putnam county, nor elsewhere, to the knowledge of complainants, who have no knowledge of and have no means of ascertaining the exact terms and provisions of said declaration of trust, except by discovery from the defendant; that on or about the 26th day of May, A.D. 1855, the said Burrough E. Carr, Sophia Carr, George Burt and Lucy Burt executed an instrument in writing, in the presence of witnesses, wherein it is recited that a declaration of trust was declared by the said Bronson on the 22d day of March, A. D. 1852, of the character before stated. And it is also recited in said instrument that on the 15th of May, 1855, the said Burrough E. Carr and George Burt, and the said Isaac H. Bronson, made and executed an agreement whereby it was agreed and provided that said Bronson should and was, from and after the date thereof, released and discharged from the further execution of said trust, and from all liability on account thereof to said *cestuis que trust.* And the bill further states that by the terms and effect of the aforesaid instrument of May 26th, 1855, the said Burrough E. Carr and Sophia, his wife, George Burt and Lucy, his wife, appointed the defendant, James Burt, as the person to take the legal title to said real estate, and thereby directed and authorized and required said Bronson to convey all of said real estate then undisposed of in fee to the said James Burt, who is to hold the said property in trust, and to execute to the said parties to said instrument such declaration of trust as might hereafter be agreed upon; that soon after the aforesaid instrument was executed, the said Bronson did execute and deliver a deed of conveyance of said real estate to the defendant, James Burt, whereby the legal tite passed and vested absolutely in the said James

Burt; that while it is notorious and generally known in said county of Putnam, that the deed last aforesaid was executed and delivered, said deed has never been recorded in said county; that on the 3d day of August, A. D. 1858, Burt did execute and deliver a declaration of trust in favor of said defendant, Sophia R. Carr, whereby he agreed and bound himself to hold a certain portion of said real estate, hereinafter specified, in trust for the said Sophia R. Carr, her heirs and assigns; that in the said declaration of trust last mentioned, it is duly recited that James Burt aforesaid, at the instance and request of the said Burrough E. Carr and Sophia, his wife, and George Burt, had conveyed absolutely in fee simple, by deed bearing date the 3d day of August aforesaid, one-half of the unsold part of said Palatka tract property then remaining in his hands to George Burt; that said lands held in trust by the said James Burt for the said Sophia, her heirs and assigns, have been divided into town lots of the town of Palatka; that before the declaration of trust last aforesaid was made, the part of said trust property or real estate originally conveyed to said Bronson as aforesaid, which belonged to and was intended for the said Lucy Burt, had been duly set apart to her, and that the said Lucy Burt departed this life several years ago, and that her heirs have no interest whatever in the aforesaid lots claimed as the portion of defendant, Sophia R. Carr; that on or about the 10th day of November, A. D. 1870, the said Sophia R. Carr, Maria J. Carr, Annie C. Gilbert and John T. Carr, the widow and heirs of said Burrough E. Carr, made and executed a certain writing, under seal, to Wilkinson Call, Esq., wherein it is recited that certain real estate in the town of Palatka aforesaid, meaning the real estate hereinbefore mentioned, was conveyed to James Burt by said Burrough E. Carr, in his life-time, and that said James Burt had made a declaration of trust of said property for the use and benefit of said Sophia R. Carr, and that said

declaration had not been recorded, and that said Sophia R. Carr desired said trust to be made of record and placed beyond a doubt, and to make said Wilkinson Call trustee, and to make the trust to him irrevocable; that after such recital the said writing purports to be a power of attorney to the said Call to sell said real estate, provided it can be sold for $24,000, and invest the proceeds in bonds of the United States, the bonds to be held by Call, under his sole control and direction, in trust for said Sophia; that after the execution of said writing to Call, the defendant, Sophia R. Carr, lost her confidence in Call, and pretending to be alarmed for the safety of her property. Afterwards, to-wit, on or about the 29th of December, A. D. 1871, she, the said Sophia R. Carr, and the said Wilkinson Call made and executed a certain deed or instrument, under seal, to the defendant, Caleb W. Loring, whereby the said Sophia and the said Caleb W. Loring pretend that all the interest of the said Sophia R. Carr in, to, and of the said real estate was conveyed to the said Loring; that the consideration expressed in the deed last aforesaid in one thousand seven hundred and sixty-seven and 7-100 dollars, and other good and valuable consideration; but the complainants aver that the defendant, Loring, did not purchase said real estate in good faith for good and valuable and adequate consideration, and did not pay anything of value for said deed to him. Loring is a brother of the said Sophia; that said deed is a mere pretence and device entered into between said Sophia and Loring for the double purpose of wresting from the said Call any authority and control which he then was supposed to have over said property, and to protect the interest of the said Sophia in said land and lots aforesaid, and to place said property beyond complainants' reach; that said Loring was, before said pretended deed was made, a trustee for dsai Sophia, and as such trustee, from time to time, paid over money arising from said trust estate held by him to

the said Sophia, and that if any money was delivered to said Sophia by the said Loring at the time said deed was made, it was the money of the said Sophia, or money of the said Loring advanced to the said Sophia as a mere color and pretence, to be re-imbursed out of said trust estate held by said Loring; that the goods, wares, and merchandise were sold and delivered before the last aforesaid deed was given, and said B. E. Carr & Co. were then indebted for the same, and by such deed said Sophia R. Carr and said Loring hoped and intended to defraud your complainants out of their demands; that said deed last mentioned is a mere colorable deed, and not real and *bona fide,* and that if it were otherwise the said Loring, if he acquired any interest in said real estate, he acquired the same with notice that James Burt aforesaid held the legal title thereto and property aforesaid in trust as aforesaid, and the complainants aver that the said Loring and the said Sophia R. Carr are now and have been for sometime endeaving to persuade the said James Burt to convey by deed in fee the said land and town lots to the said Loring for the purpose of obstructing the complainants and other creditors in the recovery of their demands; that said Loring in his answer, filed March 19, 1872, to a suit brought in said Circuit Court of Putnam county, by James R. Van Brunt and Henry L. Slaight against said Sophia R. Carr, James Burt, and Caleb W. Loring, admitted that the legal title to said land and lots was vested in the said James Burt; that the said real estate in Palatka aforesaid is estimated to be of the value of above twenty thousand dollars, and that said Sophia R. Carr has and receives, and is entitled to receive, from the property held in trust in the State of Massachusetts by the said Loring an annual income of several thousand dollars, which is largely in excess of the amount necessary for her support and maintenance, and the complainants aver that they have been informed, not only by the aforesaid deeds and

declaration of trust, but otherwise, and believe and allege that neither the said James Burt nor the said Loring hold any of the trust property aforesaid upon the specific trust to apply the income for the support of the said Sophia; that said Sophia R. Carr promised to pay some of the creditors of the said firm of B. E. Carr & Co. out of the money arising from said trust estate in the State of Massachusetts, but now refuses to do so, and pretends and alleges that said trust estate is not subject to the payment of said creditors.

There was a decree *pro confesso* as to the defendants, except Loring, who answered.

The answer of Loring admits that judgments were obtained and executions thereon issued and the same returned as charged, and says he has no information enabling him to say whether the firm of B. E. Carr & Co. have any property subject to execution, and admits that said judgments were obtained for goods, &c., sold to B. E. Carr & Co.; and says that it is wholly immaterial and irrelevant as to whether or not the said Sophia R. Carr had the chief control of the affairs of the said firm of B. E. Carr & Co., yet that he is informed and believes that by the articles of copartnership between the members of the said firm the said Sophia did have a voice in certain particulars in the affairs of the firm; but this information has been received by him since this suit was begun, and he had no knowledge of the terms of said partnership at the time he acquired title to said lands as set forth in the answer. The answer states that the articles of copartnership between the members of the said firm of B. E. Carr & Co. were published as required by the laws of the said State of Florida authorizing limited copartnerships, and that said articles as published contained the following clause, viz: "Sophia R. Carr shall be a special partner in said firm, with a liability limited to the amount invested by the said Sophia R. Carr, viz: the sum of three thousand dollars, or about that sum, and the

said Sophia R. Carr shall not in any event be liable for the debts of said firm in any other respect or extent, except that the interest of the said Sophia in the said firm and its assets shall be liable for the debts of the same;" and claims that the publication of said articles containing the above quoted provision was, in matter of fact, full, complete, and lawful notice to complainants of the extent of credit that could be given said firm because of the connection of the said Sophia therewith, and also of the extent of her responsibility for debts contracted by said firm; that the goods were sold complainants on the faith and belief that the said firm of B. E. Carr & Co. would pay its own liabilities, and that the liability of the said Sophia R. Carr would be limited in accordance with and under the said articles of copartnership; that the said Sophia did not, after her husband's death. for several years receive her support chiefly from goods, &c., of said firm of B. E. Carr & Co., but received her support chiefly from funds forwarded to her by himself; that the defendant is in no manner by blood or marriage, near or remotely, related to the said Sophia R. Carr; that he does hold certain property in Massachusetts under a trust of the strictest nature, the income of which, in his discretion, he is empowered to pay to said Sophia, as will be fully and conclusively seen by and from the will of Sally Blake, mother of the said Sophia; that he is the sole and surviving trustee named in said will; that James Burt was at one time trustee for Mrs. Sophia R. Carr of property in Palatka, Putnam county, Florida, but is not now, nor has he been trustee for her since the recovery of the judgments set forth in the complainants' bill, nor since the commencement of proceedings in the actions in which said judgments were obtained. The answer admits the execution and delivery of each and every deed, declaration and instrument referred to, but insists, however, that the same are not complete, inasmuch as

they do not contain a copy of a deed executed and delivered March 29, 1871, by said Sophia R. Carr to Wilkinson Call of the said property in Palatka, Putnam county, Florida, the said deed being of record in Putnam county, and being a conveyance of the property in trust for the use and benefit of Sophia during her life, with limitations over, and giving power to Call to sell and convey real and personal property, receive income and payments, collect, compromise and settle claims, to make investments and to manage the mercantile interests of Sophia, and make certain purchases, and to mortgage her property to raise money for certain purposes, and large discretionary powers.

The answer also states that on December 27th, not on the 29th, A. D. 1871, the said Sophia R. Carr and Wilkinson Call executed this deed; that the consideration expressed in said deed is truly and correctly stated; that the true reasons and occasion and circumstances that led to the making of said deed and his purchase of the property described and conveyed, are these: Mrs. Sophia R. Carr, while in Massachusetts, in December, 1871, informed this defendant that she was embarassed, and in great trouble in relation to the settlement of her husband's estate; that it was necessary to raise money for the purpose of settlement, and he was requested by her and her friends to buy the house and store property in St. Augustine, Fla., belonging to that estate, and at what was represented to him as a very low price. He sent Samuel Snow, Esq., his attorney, to Florida, with funds of defendant's own, for the purpose of buying that property. Mr. Snow found the title not satisfactory and refused to buy. Mr. Snow was also employed by him for the benefit and in the interest of Mrs. Carr, to assist her in her trouble in the matter of the settlement of her husband's estate. He found Wilkinson Call with a conveyance, and in possession, with right of control of all her personal property, and the amount in St. Augustine, Florida,

amounted to many thousand dollars, as he is informed and believes over four thousand dollars, besides a large amount of debts due the firm; also of the Palatka property described under said deed to Call; that Call was threatening to sell the said property in Palatka to meet payments he had to make for Mrs. Carr in settlement of the estate named. He was drawer and endorser of a draft made at Jacksonville, Florida, May 25, 1871, and held there by the Freedman's Saving & Trust Company, on which he had signed as attorney for the estate of B. E. Carr, and for Mrs. Sophia R. Carr, payable in sixty days, for $1,640. The draft had been protested, principal, interest and protest amounted to $1,767.07. Mrs. Carr was anxious to get the property conveyed by her to him out of his hands and control, that she might be untrammelled by him in the disposition of the same, and the settlement of her husband's estate. She besought Mr. Snow to aid her. Various plans were proposed and set aside. Finally, as a last resort, Mr. Snow proposed to Mr. Call and to Mrs. Carr to buy for and in the name of this defendant the Palatka property, provided he could obtain the consent of of this defendant. The said consent was obtained by telegraph. He offered in payment of said property, and upon the understanding that Mr. Call would give Mrs. Carr possession and free control of her other and her personal property in St. Augustine, Florida, to take up and pay the draft above described, have this defendant assume and pay the expenses of his trip and his cash disbursements made in said trip for Mrs. Carr, and on the part and in the name of this defendant, assume an obligation entered into by said Call for Mrs. Carr, in favor of one Margaret Cook, guardian, of John R. Hanson for one thousand dollars, which was represented and claimed by said Call to be charged on the said Palatka property; also agreed to pay whatever sum might, in settlement between said Call and

said Sophia, be found due said Call, claimed by him to be about the sum of one thousand dollars; also to pay the charges of A. R. Meek, Esq., of Jacksonville, Florida, in obtaining and bringing about a settlement between them; also to pay A. D. Basnett, Esq., of Jacksonville, one hundred dollars for services for Mrs. Carr in the matter of the sale, or steps for the sale, of the house and store property before named in St. Augustine; also the taxes then due and unpaid upon the said Palatka property. Mrs. Carr, under the belief that the said property could be sold ultimately at a large price, for some time declined to yield her consent for the conveyance by Call, unless Mr. Snow would, in the name of this defendant, give her an obligation that this defendant would hold said property as security for his advances, payments and proposed obligations. This Mr. Snow positively refused to do, requiring that the purchase must be free from any trust in her favor. The proposition of Mr. Snow above set forth substantially was finally accepted and the conveyance was executed.

That at the time of the execution and delivery of the deed from Call and Sophia R. Carr to defendant, the sum of one thousand, seven hundred and sixty-seven dollars and seven cents ($1,767.07) was paid by said Snow for defendant to the Treasurer or President of the Freedman's Saving and Trust Company at Jacksonville, Florida, at the request of said Sophia R. and said Call, in payment of the draft. This sum and a small sum of money at that time advanced to, and paid out for Mrs. Carr, constitute the entire amount of money advanced to and for said Mrs. Carr *at the time stated* by Mr. Snow in behalf of this defendant. These were paid in Jacksonville, Florida. Mrs. Carr was there at the time; this defendant was in the city of Boston, Massachusetts. That "the good and valuable considerations" named in the deed of said Call and Mrs. Carr to him was as follows:

1. The services rendered Mrs. Carr by Mr. Snow in ob-

taining from said Call control for her of her personal and other property in St. Augustine, amounting to some thousands of dollars, including a stock of merchandise in St. Augustine, thus enabling her to carry on uninterruptedly, and free from control of said Call, or from any interference by him, and all possibility of any pretence by him of right to control or interfere, the mercantile business then being carried on in said city under the firm name of B. E. Carr & Co., successors. This business was her own, and was thereafter conducted by her for several years.

2. An agreement of this defendant, executed by said Snow as his attorney, wherein and whereby this defendant was obligated—1st, to pay said Wilkinson Call whatever sum should in settlement of all accounts between said Call and Mrs. Carr be found to be due said Call; the sum claimed by said Call to be due him was about one thousand dollars; 2d, to pay A. R. Meek, Esq., of Jacksonville, Fla., for all services he might render Mrs. Carr, for whom he was to act as attorney in making, bringing about or arriving at and consummating the settlement between said Call and Mrs. Carr; 3d, to pay A. D. Basnett, Esq., of Jacksonville, one hundred dollars for services rendered Mrs. Carr in the matter of the estate of her late husband; 4th, to assume an obligation to pay one thousand dollars, at eight per cent. per annum interest, which had been entered into by said Call in behalf of Mrs. Carr with one Margaret Cook, of St. Augustine, Florida, guardian of John B. Hanson, minor, and interest then due thereon.

3. An agreement of this defendant, made by said Snow as his attorney, that all expenses of the trip of said Snow to and from Florida, and his cash disbursements, should be paid by this defendant, the same amounting to $381.50; also to pay all back taxes upon the property conveyed.

That under the will of Sally Blake, deceased, the mother of Mrs. Carr, he holds property in trust of the strictest nature,

the income of which he is empowered to pay upon his own discretion to Mrs. Carr, or in support of Mrs. Carr and her family, or add to the principal for the benefit of the children of Mrs. Carr upon her death, all of which will clearly and fully appear by reference to provisions of said will before cited. And he further says that the income of said trust property is not large, and that Mrs. Carr has many children, and some grand-children, who are in need of and require assistance and support; and that the income of said trust is not more than sufficient for the support of Mrs. Carr, and those of her family with her and requiring assistance; that James Burt was not consulted relative to said sale of the Palatka property to this defendant, or the price to be paid therefor, but that in pursuance of an endeavor on his part to get all property of Mrs. Carr from the possession and control of said Call, said Snow advised with said James Burt as to whether, if said Call could be prevailed upon to convey or transfer the title to Mrs. Carr's property in his hands as trustee to this defendant, there was anything to prevent him, the said Burt, from conveying to this defendant the naked legal title supposed to be in him in relation to the said Palatka property. Call, however, declined under every arrangement to assign his trust to this defendant. Then it was that said Snow commenced to negotiate with Mrs.Carr and said Call for the absolute purchase,in the name of this defendant, of said Palatka property, finally closing the transaction as herein above stated; that in the matter of this purchase said Burt was not advised with,and could have known nothing until after it was closed; that with his own private and individual funds, and his own obligations, entered into on his behalf by said Samuel Snow as his attorney, he became and was the *bona fide* purchaser, in his own right, of said Palatka property, for good and valuable considerations, and did not take the conveyance thereof under any agreement whatever, written or oral, understood or im-

plied, to hold the said property for said Sophia R. Carr, or to sell the same and pay its purchase-money, or any part or portion of it to her; but that he does not intend personally to make any profit out of said transaction; that if said estate should sell for more than the cost and expenses, he intends to pay the same into the principal fund of the trust estate, which he holds in strict trust, as before set forth, for said Sophia R. Carr and her children. But he says he has never made any agreement or contract with said Sophia relating to said purchase of said Palatka property, or to his disposition or use thereof, or as to his doings therewith; that since the *bona fide* deed from said Call and Sophia R. Carr, he has not returned said Palatka property to the tax assessor of Putnam county, Florida, for assessment, inasmuch as it is usual, if not the universal rule, to assess property in the name of the party in whom the legal title is found or supposed to be; and it has been found under the index of the record of deeds for said county of Putnam; that the naked legal title said property was in James Burt; he believes the same is assessed to Burt, and defendant has contented himself in forwarding from year to year to said Burt funds with which to pay the taxes assessed upon said property, and said Burt has drawn upon him for that purpose; that defendant has no discretion under the trust held by him as aforesaid to use, and has not used said income for any purpose connected with or in matter of said Palatka property, his discretion being only to pay said Sophia the said income, use it for the support of said Sophia and her children, or add it to the principal of said trust, and hold the whole, principal and income, for her children upon her death, hence he is advised and insists that it is unnecessary to set forth his account in matter of the said income from the trust property held by him as aforesaid; he further says he has not conveyed the said property into said trust; that there has been and is no agreement, express or implied, writ-

ten or unwritten, whereby he is to re-imburse himself for moneys paid and obligations assumed in purchase of said Palatka property from the sale thereof, or any part thereof, and hold the residue or remainder for Mrs. Carr, if any residue or remainder; that the legal title to the said Palatka property is in James Burt, but only naked legal title, and that he holds that at the will and pleasure of defendant, except defendant has frequently, both before and subsequent to time when said actions were began and said judgments obtained as stated in said bill, requested James Burt to convey to him the naked legal title supposed to be in him, and that said Burt, without refusing so to do, has excused himself for not complying with his request by reason of suits anticipated or commenced against him for said property; that he is informed and believes that Mrs. Carr has also made like request of said Burt; that there is nothing due from him on account of his purchase of said Palatka property; that defendant holds as a *bona fide* purchaser for valuable consideration from Mrs. Carr, all and every her interest in said property, and that he purchased all the right, title, and interest of said Sophia and said Call, or either of them, in and to every part and parcel of said property, and all the rights and privileges appertaining thereto; that he has no knowledge of his own of the value or price of property in Palatka, Florida, but that at the time of his purchase thereof its cash market value was not much, if any, more than he paid for it, under the circumstances, and that he is informed it is now worth the sum named, if sold under favorable conditions and terms of payment; that the deed of Sophia R. Carr and Wilkinson Call to him was executed, delivered, and recorded about one year and a half prior to the recovery of the judgments.

The complainants filed replication to Loring's answer. There were only two witnesses, N. H. Moragne and James Burt, examined. The former testified that the Palatka

property was worth about $15,000 in December, 1871, and the latter, that it was worth $25,000, and that it was assessed in 1871 at a valuation of $10,000, and at $12,000 for 1872, he returning it to the assessor at the same time. The consideration expressed in the deed to Loring is $1,767.07, and "other good and valuable considerations."

On the 29th day of December, 1875, the Circuit Court made a final decree to the effect that the deed of conveyance from Sophia R. Carr and Wilkinson Call to the defendant, Loring, should be deemed and taken as a mortgage security, and valid as such to the extent of securing to the said Loring the payment of all moneys by him actually paid out and advanced to the said Sophia R. Carr, or on her account as the consideration for the same; and that the Palatka property specified in the bill of complaint as the property of the defendant, Sophia R. Carr, was liable to and subject to the payment of the demands of the judgment creditors, the complainants, after the payment to Caleb W. Loring the amount due upon the said mortgage security; and that if the defendants should not pay or cause to be paid to the complainants, or their solicitor of record, within twenty days from the date of this decree, the several and respective amounts due upon the judgments and executions mentioned in the bill of complaint, together with all the costs of this suit, then, in that event, the said real estate, or so much thereof as may be necessary, is hereby decreed to be sold, and the proceeds applied to the payment of said judgments, executions and costs, after paying the amount due said Caleb W. Loring on his mortgage security; and that if the parties to the suit should be unable to agree as to the amount due Loring, there should be a hearing before the Master as to the same, and that a sufficient quantity of property should be sold to pay any other judgment creditors of B. E. Carr & Co., who should come into this suit and file certified copies of their judgments be-

fore the Master and contribute to the expenses. The decree reserved its decision upon the question of the liability of the testamentary trust property in Massachusetts held by Loring until it should be ascertained that the Palatka property was insufficicent to pay Loring and complainants.

From this decree Loring appealed.

Patterson & Meek for Appellants.

H. Bisbee, Jr., for Appellees.

The CHIEF-JUSTICE delivered the opinion of the court.

This is a creditor's bill by Dunning and others against Mrs. Sophia R. Carr and others, judgment debtors, and Caleb W. Loring, grantee, of certain property which the complainants seek to subject to the payment of their judgment. Loring alone answers the bill.

The answer alleges that by the articles of copartnership between Mrs. Carr and her copartners, she was a special partner and not liable for the debts of the firm beyond the sum of three thousand dollars, according to the statute regulating partnerships. Premising that if these facts were proved they do not constitute a defence in this proceeding, it is only necessary to remark that such defense should be made, if at all, by Mrs. Carr when she was sued for the debt of the firm. The indebtedness having been established against her by the judgment recovered against her and her partners, it is too late to interpose such supposed defence. The consideration of an indebtedness established by a valid judgment is beyond the reach of inquiry under a creditor's bill.

It is established by the pleadings and proofs that Palatka property conveyed by Mrs. Carr to Loring was worth a much larger sum than that which he had or agreed to pay her for it. In 1870, she recites in the paper designa-

ting Mr. Call as her trustee that she deems it advisable to sell the real estate at $24,000 and invest the proceeds in U. S. bonds. This may be deemed her estimate of its value at that time. In 1871, the year in which the conveyance was made to Loring, the lands conveyed are estimated by James Burt, the trustee, at the value of twenty-five thousand dollars. The witness Moragne estimates it at fifteen thousand dollars. There is no testimony as to its present value, and it is not apparent that its value at the time of filing the bill in this case was less than in 1871.

It is urged in argument by the appellant that even if Mrs. Carr's conveyance to Loring had been a mere voluntary conveyance, it could not be impeached, because, he says, she had other property remaining in her hands of the value of four thouand dollars and upwards, out of which the complainants could make their demands.

While the proposition is in general correct, that a voluntary conveyance is not necessarily fraudulent as to creditors, abundant property remaining to satisfy them, we find no facts proved in this case calling for the application of the rule. It is said in the answer that she had in 1871 in the hands of Mr. Call, beside the real estate, over four thousand dollars of personal estate, besides a large amount of debts due to the firm of B. E. Carr & Co., of which she was a member. There is no proof whatever that this statement is correct; or if correct, that the debts of the firm and her individual debts and the liabilities of the estate of her husband, other than those assumed by Loring, were less than the amount of this personal property. On the other hand, it is admitted that the execution issued upon judgments against her and her firm have been returned wholly unsatisfied, and that they have no property subject to execution. In the absence of any explanation, it must be presumed that there was no such surplus, or that in some manner it has

been put beyond the reach of her creditors, or absorbed in the payment of debts without satisfying all of them.

It is finally urged on the part of the appellant that the complainants cannot maintain the allegation of fraud in the execution of the conveyance by reason of the inadequacy of the consideration alone, or even by the additional fact that the grantee had notice of the pecuniary embarrassment of the grantor. That even the fraudulent intent of the grantor did not affect the purchaser who had no notice of such intent. In other words, that if he purchased in good faith, and for a valuable consideration, the conveyance to him would be upheld.

An examination of the circumstances under which the conveyance in question took place will show that the rule contended for can hardly be applied to this case. Mrs. Carr was the widow of B. E. Carr, and was at the time of her husband's death the beneficiary of a considerable amount of real and personal property, the real estate having been placed in the hands of a trustee for her use. She was engaged in settling the affairs of his estate, and in carrying on a mercantile business under the firm name used by her husband and partners in his life time. The new firm incurred debts in carrying on the business. It is evident that defendant Loring knew her circumstances. He was a trustee of an estate in Massachusetts, of which she was the *cestui que trust*. He states in his answer that early in December, 1871, ***she informed him*** that she was "embarrassed and in great trouble" in relation to the settlement of her husband's estate, and it was necessary to raise money for the purpose of settlement, and requested him to buy her house in St. Augustine, which she offered at a very low price. He resided in Boston, and still resides there. He sent his attorney, Snow, to Florida to assist her in her trouble. Found Call in possession of her real and personal property, "amounting to many thousand dollars." She wanted him

to aid her with money, get the property and hold it for his own security for advances, and to the end that she might have the benefit of its greater value over and above contemplated advances, which were in the aggregate less than five thousand dollars. She wanted him to give her an obligation to this effect, but he (Snow) declined to "incumber the property with a trust," and *seeing no other way out of her difficulty,* she consented to give Loring an absolute conveyance of the property upon the terms proposed by Snow, the defendant Loring consenting to the terms by telegraph. The sums to be paid and advanced were, as detailed in the answer, somewhat indefinite as to the precise amount. Among the items is one of $381 for the expenses of *his* agent Snow in coming from Boston and transacting this business. The whole transaction was without the knowledge of Mr. Burt, who held the legal title to the real estate in trust. He "was not advised with, and could have known nothing until after it was closed." There is no explanation of this fact, and no reasons given why Mr. Burt, the trustee, who, previous to that time, had been a trusted friend of the family, and who lived in the immediate vicinity, was kept in ignorance of this important transfer.

Mr. Loring was not seeking this property for the purpose of investment, and from the time of her application to him up to the time of the purchase he did not see it. Mrs. Carr, it appears, sought him, and informed him that she was "embarrassed and in great trouble" in pecuniary matters, and besought him to buy her St. Augustine house. At this point it was that he began to act and sent Mr. Snow, his agent, to assist her.

The price or value of the property is not agreed upon or fixed in any manner, nor is it definitely named in the deed. In the negotiation several amounts which he is to pay are named, and several items indefinite in amount are included. This is a somewhat peculiar mode of transacting this kind

of business; peculiar on the part of both buyer and seller, if it be regarded as a purely *bona fide* bargain and sale. The item of $381 for the expenses of the *purchaser's agent* in making the purchase, to be *paid by the seller,* is something out of the ordinary track of business. Yet Mrs. Carr is to pay and allow as part of the purchase-money this item, not her own debt or her own benefit, but the expenses of the purchaser in buying her property again, the conveyance by Call and Mrs. Carr of the real estate to Loring. Also conveys to him "and to his heirs and assigns forever, all the goods and chattels, houses, lands and estate, both real and personal," referring to all her interest in the mercantile firm, and its property, and "all bills, notes, accounts, moneys," &c., which the answer says were of the value of "several thousand dollars," and "of the value of four thousand dollars, besides a large amount of debts due the firm." What became of this personal property after it was thus transferred to Mr. Loring does not appear, except as stated in the answer, that she continued to carry on the mercantile business after Mr. Snow had assisted her in obtaining control of her personal and other property from Call. If it be true, as he states, that he obtained this real property, worth fifteen to twenty thousand dollars, or more and personal property worth four thousand or more, for $1,767 cash, and his promise to pay about $3,000 more, (including his own expenses in driving the bargain,) knowing as he did from Mrs. Carr that she came to him in her distress from pecuniary embarrassments, and that she desired his assistance to save her property from sacrifice, that creditors were pressing, and Call, the trustee, was threatening, it presents a case in which a court of equity would be reluctant to withhold its power either in her behalf or in behalf of her creditors. There is no escape from the conclusion, from this record, that Mrs. Carr's inability to pay these judgments has arisen from the absorption by this defendant of all her property in

exchange for a "mess of pottage." He, however, says, in his own behalf, that though his purchase was absolute and *bona fide*, yet "he does not intend personally to make any profit out of said transaction," but if the property brings in more than the cost and expenses, he intends to "pay the same into the principal fund of the trust estate, which he holds in strict trust for said Sophia R. Carr and her children," but protests that he has never made any agreement to do so; and right here it is that equity steps in to give appropriate direction. It is apparent from the whole case that the intention to secure this property to Mrs. Carr and her children influenced this defendant, and it is honorable on his part to make announcement of his intention to deal justly by those whose property he so absolutely controls. He should go yet farther toward relieving them from this indebtedness, and in this he must have the aid of this court. His expressed intention to appropriate the greater part of the value of the Palatka property for the benefit of this judgment debtor and her family, may fairly be said to have been formed when he advanced money to relieve them of a portion of Mrs. Carr's embarrassments; and this is precisely what the complainants, as creditors, complain of and are striving to prevent.

The question of fraud is one of motive and intent; a conclusion to be inferred from all the circumstances of the case. In Chesterfield et al. vs. Jansen, 2 Ves. 125-155-6, Lord Hardwicke, in classifying the various kinds of frauds, says: "A third kind of fraud is that which may be presumed from the circumstances and condition of the parties contracting. * * But it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do, is equally against conscience as to take advantage of his ignorance. A fourth kind of fraud may be collected or inferred, in the consideration of this court, from the nature and cir-

cumstances of the transactions as being an imposition and deceit upon the other persons not parties to the fraudulent agreement. Particular persons in contracts shall not only contract *bona fide,* as between themselves, but shall not transact *mala fide* in respect to other persons, who stand in such relation to either as to be affected by the contract or the consequences of it; and as to the rest of mankind, beside the parties contracting are concerned, it is properly said to be governed on public utility."

If the transaction in question was not an imposition upon Mrs. Carr, taking advantage of her necessities while "in great distress" and "embarrassment," according to defendant's answer, and thus perhaps liable to be set aside even by her, and it was fully acquiesced in by her, it may fairly be regarded as an imposition upon other persons not parties to it—"*mala fide* as to other persons who stand in such relation to either as to be affected by the contract or the consequences of it," and thus against public policy, according to the language of Lord Hardwicke.

The purchase of the property under the circumstances, not at the suggestion or solicitation of Loring, but at the sole solicitation of the debtor, with full notice of the financial embarrassment of the debtor; without contracting for a specific price or consideration, as though it was of no consequence; the payment as part of the consideration of the purchaser's expenses in making the purchase; the legal title remaining in Mrs. Carr's trustee; the possession remaining unchanged; the relations of the contracting parties, the purchaser being the trustee of the seller's estate in Massachusetts; the gross inadequacy of the price paid, or agreed to be paid; the total disappearance of several thousand dollars in value of personal property and effects of Mrs. Carr, which were conveyed with the land to the purchaser, Loring—all give to this case an aspect which is far different from the mere purchase of property in the ordinary course

of business, for an inadequate consideration, with or without notice of the vendor's indebtedness.

Here appear a multitude of facts, which, taken together, destroy the presumption of good faith on the part of seller and purchaser, "in respect of the rights of others who were not parties to it."

The appellant says that by the decree the complainants have accomplished for Mrs. Carr what she could not have asked in her own behalf, to-wit: the construction that the deed is merely a mortgage. Whether Mrs. Carr could have asked and obtained such a decree, under the circumstances, is not the question here. Mrs. Carr says nothing. The decree goes against her by default, and upon the record the bill stands confessed by her. The decree gives to the defendant Loring a lien upon the property to the amount paid by him, and the conveyance for this purpose is treated as a mortgage so far as the rights of the complainants are affected, and whether it is technically or appropriately deemed a mortgage *eo nomine,* is of little consequence. The court gives the defendant Loring a preferred lien for the money advanced, and he may well be content with the priority accorded to him. His conveyance is deemed by the court to be voidable by the creditors only so far as it purports to be evidence of an absoluate sale *as against complainants.*

As Mr. Loring's legal and equitable rights are saved by the decree in this form, he cannot reasonably complain of it. As is said by the court in Barrow vs. Bailey, 5 Fla., 45: "In equity, where a security or conveyance is found to be constructively fraudulent, it is upheld in favor of one not guilty of fraud, to the extent of the actual consideration, and is vacated only as to the excess; and so when the property is of greater value than the consideration, the conveyance may be impeached as being voluntary to a partial extent, and if there be no actual fraud (on the part of the grantee) will be sustained to the extent of the consid-

eration and vacated as to the residue, or the grantee be decreed to be, as to such residue, a trustee for creditors." And the court says further, quoting from Chancellor Kent, that nothing can be more equitable than this mode of dealing with these conveyances, of such indecisive and dubious aspect, that they cannot either be entirely suppressed or entirely supported with satisfaction and safety.

We commend and adopt the able opinion of Mr. Justice Thompson in Barrow vs. Bailey upon the question of fraud in the conveyance of this property.

The decree of the Circuit Court is sustained.

The appellants filed a petition for re-hearing, which the court denied.

JOHN F. TYLER, MARSHAL OF THE CITY OF JACKSONVILLE, APPELLANT, VS. JAMES R. PAINTER, APPELLEE.

1. A writ of error is the exclusive method by which a judgment in a habeas corpus proceeding is reviewed in this court.
2. The general statute regulating notice, and the practice in writs of error, do not apply to the writ of error authorized under the statute regulating proceedings upon habeas corpus. The practice in such cases is in the discretion of this court.

This is an appeal from a judgment of the Circuit Court for Duval County, in a habeas corpus proceeding discharging the appellee from arrest made by the applicant as Marshal of the city of Jacksonville, upon a warrant issued by the Mayor of that city upon a charge of a violation by the appellee of an ordinance of the city.

The opinion of the court states all the facts involved in the points decided.

J. W. Whitney and *C. P. Cooper* for Appellant.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court for the Fourth Judicial Circuit, rendered in a habeas corpus proceeding.

An appeal is not the method by which such proceedings are reviewed in this court. Under the statute regulating the subject a writ of error is the exclusive remedy. Thomp. Dig., 529-530. The method of proceeding under that statute is discussed in *ex-parte* Finch, 15 Fla., 632, and in *ex-parte* Edwards, 11 Fla., 174. This writ of error is not regulated by the general statute upon the subject of writs of error. Thomp. Dig. 446-7. The practice as to notice and the terms upon which the writ may be granted, are matters of discretion in this court.

There being no appeal from such judgment, the appeal must be and is dismissed.

DECISIONS

OF THE

Supreme Court of Florida.

JUNE TERM, A. D. 1877.

JAMES G. GIBBS, ET AL., APPELLANTS, VS. GEORGE F. DREW, GOVERNOR, APPELLEE.

1. Franchises which are incorporeal hereditaments of an intangible nature, are not embraced within the meaning of the terms "lands or tenements" in the act regulating the proceeding of unlawful detainer. *Hence*:

2. A railroad being a public work, the possession of which is necessarily attended by the right and duty to use and employ the franchises granted by the sovereign in connection with it, an action of unlawful detainer does not lie to recover possession of a part thereof, as this involves the right to and the public duty of exercising these franchises.

Appeal from the Circuit Court for Gadsden county.

This is a proceeding under the unlawful detainer statute brought by the appellants in the Circuit Court of Gadsden county against the respondent. The appellants, in their complaint, alleged that the respondent, "as Governor and successor of Dennis Eagan, in the property hereinafter mentioned, unlawfully and against their consent, withholds from them the possession of certain real estate, known and described as follows: All that portion of the Jacksonville, Pensacola and Mobile Railroad lying west of the Quincy depot and extending thence westward to the Apalachicola river, with the appurtenances lying and being in the county of Gadsden and State of Florida." They prayed restitution of possession and their damages.

There was an appearance, and at the ensuing regular term, a motion by defendant to dismiss upon the following grounds:

1. This action does not lie or obtain against the defendant, as Governor, to recover possession of the Jacksonville, Pensacola and Mobile Railroad west of Quincy.

2. The action does not lie or obtain to recover possession of a railroad.

3. There is no description in the complaint of any property recoverable by the action brought.

After hearing, this motion was granted, and judgment entered dismissing the complaint. From this judgment this appeal is prosecuted. The error here assigned is that the Circuit Court erred "in granting the defendant's motion and dismissing the plaintiffs' suit."

John W. Malone for Appellants.

R. B. Hilton and *R. H. M. Davidson* for Appellee.

Judge Bryson, of the Third Circuit, and Judge Dawkins, of the Fifth Circuit, sat in this case in place of the Chief Justice and Justice Van Valkenburg, who were disqualified.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

While the statute regulating this special proceeding provides, "that if it shall appear to the court at the return day of the summons that the defendant has been duly served with said summons, agreeable to the requirements of this act, it shall proceed, without further pleadings in writing, to empanel a jury for the trial of the cause," still, in the very nature of things, the defendant may, in case he wishes to raise pure questions of law, adopt some method so to do without the intervention of a jury. The method here adopted was a motion to dismiss. To this no objection has been

taken, and we think it is proper. This motion must be treated as a demurrer.

There is but one question which we think necessary to consider in the disposition of this case. That question is, what is the legal signification of the term "railroad" in this pleading, and do the terms "lands or tenements," as used in the statute regulating this proceeding, embrace railroads as defined? This complaint must be construed most strictly against the appellants. If the term "railroad" embraces something not included in the terms "lands or tenements," and that something is not the subject of this proceeding, then that is an end of the matter.

As the term highway imports in law a road, the use of which is in the public, so the legal signification of the term "railroad" is not only a road or way on which iron rails are laid, but a road as incident to the possession or ownership of which important franchises and rights affecting the public are attached. This is unquestionably one of its significations. If it was the purpose of the appellants to recover something other than this, or to recover à road to which no such incidents were attached, the description should be so framed as to bring the subject-matter of the action within the terms of the statute, that is, the metes and bounds should be stated according to the usual and well-recognized legal methods of boundary.

There is nothing here which would authorize us to conclude that this road has been the property of a corporation now dissolved, having lost its franchises by any of the various methods by which this may happen. We therefore treat it as a railroad to which belongs the franchises usually attached to such a public work. The franchises which usually appertain to such a public work are incorporeal hereditaments as contra-distinguished from "land," which is a corporeal hereditament; and while the term "tenements" embraces some franchises, still this term as used in the statute

must, from the nature of the proceeding, be restricted to tenements upon which an entry can be made, and of which there can be tangible possession. (6 Litt., 184.) "Restitution ought only to be awarded for the possession of tenements visible and corporeal," says Baron Comyns in treating of this subject. (Comyns' Dig., Tit. Forc. Entry, Letter D, 7.)

The term "tenements" is used in the English statutes upon this subject, and yet, says Sergeant Hawkins, (1 Hawk. P. C., ch. 28, sec. 31, page 502,) "it seems clear that no one can come within the danger of these statutes by a violence offered to another in respect of a way or such like easement which is no possession." The general rule under the English statutes is, that this proceeding is restricted to the recovery of the possession of hereditaments for which a writ of entry would lie at common law or by statute. (Coke Litt., 343; Lamb Ins., 153.) If this be so, and that it is so cannot be doubted, the remedy cannot exist for the recovery of the possession of a public work to which is attached important prerogative franchises, rights, and duties resulting from a special grant by the sovereign, and which cannot be included in any proper definition of the term "tenements" as used in this statute. But even if it be admitted that the right to the possession of a railroad as thus defined can be made the subject of this proceeding, it certainly must appear affirmatively, must be alleged in the complaint that the party is the owner of the franchise of a public character which exist in connection with it. These cannot be thus separated. There is no such allegation here. Again, the franchises which belong to the owners of the J., P. & M Railroad exist necessarily as appurtenant to the ownership or possession of the *whole line of road,* and not to the ownership or possession of *a part.* In the very nature of things, therefore, the plaintiff cannot be entitled to these franchises, as he claims an unlawful detainer of only a part of this

road. The claim is for a "portion of the Jacksonville, Pensacola and Mobile Railroad."

Our conclusion is that a railroad is a public work, the possession of which is attended with the right and duty to use and employ the franchises granted by the sovereign in connection with and as appurtenant to it, and that the proceeding of unlawful detainer does not lie to recover the possession of a part of such public work, as this necessarily involves the right to these franchises, and generally, that franchises appertaining to a railway being incorporeal hereditaments, intangible in their character, are not embraced within the terms "lands or tenements" in the act regulating this proceeding.

Judgment affirmed.

HARLEY SCOTT AND EVA SCOTT, BY THEIR NEXT FRIEND, PLAINTIFFS IN ERROR, VS. WALTER F. LLOYD ET UX., DEFENDANTS IN ERROR.

Heirs at law are not proper plaintiffs in action for unlawful detainer, where defendant is in possession under a lease made by the ancestor in her life-time. The right of possession and consequently the right of action passes to the Administrator or Executor as an incident of the asset.

Writ of error to the Circuit Court for Leon county.

The facts of the case are stated in the opinion of the court.

R. B. Whitfield for Plaintiffs in Error.

T. L. Clark for Defendants in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action for unlawful detainer brought by the plaintiffs in error as plaintiffs against the defendants in error in the Circuit Court of Jefferson county, on the 28th of January, 1876. The complaint alleges that the defendants unlawfully, and against the consent of the plaintiffs, withhold from the plaintiffs the possession of certain real estate therein described, being a lot at Lloyd's Station, in Jefferson county, and prays restitution of possession and their damages. A summons was issued by the clerk of said county and served on the defendants, who caused their appearance to be duly entered in the case on the 7th day of February, 1876.

On the 8th day of April, 1876, the parties, by their respective attorneys, agreed upon a statement of the facts existing in said suit, reduced the same to writing, and after signature, caused it to be filed with the clerk of the court.

By the consent of the parties, the cause was then transferred to the Leon County Circuit Court, that being in the same judicial district. On the 8th day of April, 1876, the cause was by consent tried by the court on such statement of facts, who found "that the defendants did not,at the time of the filing of the complaint in this case, wrongfully hold possession of the real estate mentioned in the complaint against the consent of the plaintiffs; that the said defendants have not so held possession thereof against the consent of the plaintiffs within three years next before the filing of said complaint, and that the plaintiffs have not the right of possession in the real estate aforesaid, etc.," and ordered judgment for defendants for costs.

Upon this judgment the plaintiffs sue out their writ of error to this court.

The facts as agreed upon by the parties and upon which the case was submitted, are as follows:

About January 1st, 1874, the defendants in error took possession of the property mentioned and described in the complaint, under an oral lease, for the term of three years, from Mittie Scott, mother of the infant plaintiffs, she having at that time title to the said property from her late husband, Daniel Scott, deceased, such title deed dated in November, 1871.

On the 3rd of January, 1874, Mrs. Scott filed her claim to the benefit of a homestead on the premises, under the laws of Florida, and on the 12th of August in the same year died, leaving the infant plaintiffs her only heirs.

Before the date of the deed to Mrs. Scott, given by her husband, Daniel Scott, a judgment was rendered in favor of Orff, Watkins & Co., against A. W. Mason & Co., based upon a cause of action which arose on the 30th of July, 1868, and Daniel Scott was a member of such firm of A. W. Mason & Co.; that on the 4th day of January, 1875, after the death of Mittie Scott, while the defendants were in possession under their oral lease, the property was sold under and by virtue of an execution on the said judgment, and was bought at such sale by the defendant, Sallie D. Lloyd; that defendants have been in continued and uninterrupted possession of the premises from the time they went into possession under said oral lease to the present time; that in January, 1876, defendants received written notice to vacate said property or pay rent for the same, which they have failed to do.

It does not appear from the statement of facts upon which the court determined this case, whether the mother of the plaintiffs, Mittie Scott, died intestate or not, or whether there was any administration of her estate. They commenced their action of unlawful detainer as her sole heirs, and they seem to proceed under the idea that they, as such

heirs, were solely interested in or capable of exercising control of the real estate of their deceased mother. Whatever may have been the rule under the English law, such is not now the case under the statutes of our State. Real estate, and whatever is comprehended by that term, is, by the express act of our legislature, made assets in the hands of an executor or administrator.

The act passed in 1833 (Thom. Digest, 202,) is explicit and cannot be misunderstood. It provides that "real estate shall be considered assets in the hands of executors or administrators, and after the personal assets are exhausted, may be sold under an order or decree from the judge of probate, or officer discharging the functions of ordinary or judge of probate;" providing also the proceedings which shall be taken in order to make such sale valid and effectual. To such an extent did the Legislature go, that it authorized the judge of probate to decree the sale of real estate of any deceased person in preference to a sale of his slaves, where it was necessary for the payment of just debts, and where it was deemed most beneficial to the heirs, legal representatives or devisees of the estate.

The effect of this statute has been very ably commented upon by Mr. Justice Hawkins, in the case of Gilchrist vs. Filyau and wife, in 2 Fla., 94. The learned Judge says: "In England, if a man died seized in fee, the descent goes to his eldest son, and the lands are not assets in the hands of the administrator for the payment of his debts. By the laws of Florida there is no such thing as primogeniture: the lands descend in parcenary, and are expressly declared assets in the hands of the administrator or executor, and after the exhaustion of the personal assets, may be sold to pay debts due by the estate, besides being liable with personal property to an execution existing upon any judgment against such executor or administrator. Here we see all distinctions known to the English law between the real and

personal estate, as to their being assets in the hands of the executor or administrator, entirely done away, subject to some modifications to be noticed hereafter. This distinction being once established, the same rights, duties, and liabilities as to both seem to be the necessary result and consequence." Again he says: "Although by our statute of descents the fee is clearly in the heir, so that the inheritance may remain unbroken, yet it is so cast upon him subject to the debts of the intestate, and I might add the dower of the widow. If the lands are assets, they must carry with them the incidents of assets, and when the law declares them to be such, the power to render them available necessarily follows as an incident."

The rents and profits are incident to the land, and it is obvious that the law intended that the whole estate should be subject to the payment of debts.

This opinion was approved by this court in the case of The Union Bank vs. Heirs of Powell, 3 Fla., 175, and is therefore the well settled law of the State. The right of possession is an incident of the asset, and of course must pass to the personal representative under our statutes and not the heirs. He takes the rights of possession appertaining to the ancestor, and so holds and controls them until the settlement of the estate, or he is relieved by the determination of a court of competent jurisdiction. Harwood vs. Marye, 8 Cal., 580; Curtis vs. Sutter, 15 Ill., 259; Carnall vs. Wilson, 21 Ark., 62; Thompson vs. Duncan, 1 Tex., 485; Edwards vs. Evans, 16 Wis., 193; Smith's Landlord and Tenant, 80.

This question is in no way changed by the act of February 16, 1870, which is the law now controlling with regard to the duties of personal representatives in the sale of real estate. By the terms of this law the real estate is made assets in the hands of the executor and administrator, and it modifies and changes some of the other provisions of the

previous statute. The same reasoning applies with equal force to the latter as to the former law.

It is not necessary to examine or pass upon any of the other questions in the case, as the judgment must be affirmed for the reason that the plaintiffs are not the proper parties to maintain the action.

Judgment affirmed.

JESSE ROBINSON, PLAINTIFF IN ERROR, VS. WILLIAM ROBERTS, DEFENDANT IN ERROR.

The Supreme Court has authority to prescribe a rule requiring appellant to give a bond or make a deposit for costs with the Clerk.

The plaintiff in error moved for a rule against the Clerk of the Supreme Court to compel him to docket the case. A rule for the Clerk to show cause was granted, and he answered the same, setting up the 21st Rule of Practice in the Supreme Court, and that the plaintiff in error had not complied with the requirements of the same, either by giving bond or recognizance, or making the deposit, which the Clerk is thereby authorized to exact before docketing a case.

D. L. McKinnon for the motion.

F. T. Myers contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Rule 21 of the Rules of Practice of this court provides "that the Clerk may exact security in advance for the payment of his fees, which security may be by a bond or recognizance, (to be approved by him or by a Circuit Judge or a

Justice of this court,) or a deposit of fifteen dollars before docketing a cause."

The question in this case is, has this court, under the statute of this State, or by virtue of any other authority, the power to make this rule? The rule requires of an appellant security for costs in the shape of a bond or deposit.

While the power of the English courts over this subject was derived principally from statute, under the liberal construction given to the Statute of Gloucester, (6 Ed. I., Ch. 1, § 2,) still, as Blackstone remarks, it was a maxim of the English as well as of the civil law that *victus victori in expensis condemnandus est,* although the common law did not professedly allow any. 3 Black., 399. At common law there was no judgment for costs; each party paid his own costs as they accrued. While this is true, still the courts in England, acting either upon the implied powers resulting from the various acts of Parliament or upon inherent authority to secure its officers in the payment of statutory costs, or to protect the parties in the expenditure of costs, have, independent of any direct and express statutory authority, required security for costs in various cases. In ejectment or actions *qui tam,* where the lessor of the plaintiff, or the plaintiff himself, was unknown to the defendant, the court, upon certain representations, would stay the proceedings until security was given for the payment of costs; and there were many other cases in which such security was required. 1 Tidd. Prac., 476; 1 Str., 694; 2 ib., 932-1206; 1 Wil., 130-266; Cowp., 24; Bul. Ni. Pri., 112; 2 Bur., 1177; 1 H. Black., 106; 1 T. R., 362; 6 T. R., 496. This requirement was made without any express statutory authority so do to.

The like power is exercised in this country by the Supreme Court of the United States. Under Rule 10 of the Rules of Practice of the Supreme Court of the United States, the Clerk is required in all cases to take of the party a bond,

with competent security, to secure his fees, in the penalty of $200, or a deposit of that amount to be placed in bank subject to his draft; and such is and has been the practice of that court for years. We are aware of no statute granting in express terms this authority to the Supreme Court of the United States.

Under the statute of this State, "full power is conferred on this court to make any and all rules of practice, pleadings and proceedings" to carry out the provisions of the general practice act, approved February 24, 1873, as well as "to prescribe, regulate and control the practice, pleadings and proceedings in the several courts of this State." Chap. 1,938, Laws of Florida.

This legislation gives this court the fullest power that can be granted in general terms over the subject of prescribing rules for the regulation of its own practice, and there is no other statute which limits our power in the matter. Looking, therefore, to precedent and authority in the highest courts in England, and to the practice in the highest court in this country, there can be no question that this court has the power to prescribe this rule.

The rule is discharged.

ALVORD, KELLOGG & CAMPBELL, APPELLANTS, VS. FRANK E. LITTLE, APPELLEE.

1. After the time (10 days) allowed by law for taking an appeal, the appeal not being perfected, the Legislature passed an act allowing thirty days, and extending its provisions to cases in which judgment had already been entered: *Held*, that the act extending the time and reviving the proceeding for obtaining a review by appeal, applied only to the remedy and did not affect a vested right. Two years are al-

lowed for writs of error by which the review could be obtained, and it was competent to extend the time of appealing to the full term of two years, in the discretion of the Legislature.

2. L. entered into an agreement with A. and K. to form a mercantile partnership, and before perfecting their articles or paying up the capital stock, they purchased goods and other property in the contemplated firm name of "A. K. & Co." The terms of the partnership agreement not being complied with by L., the enterprise was abandoned, and afterwards A. & K. formed a partnership with one Campbell, under the name of "A. K. & Campbell," who took the goods previously purchased by "A. K. & Co." and paid for them, and employed L. as their clerk and assistant. L. now sues "A. K. & Campbell" for his services as clerk, and for his services and expenses in going to New York and purchasing the goods which were bought in the name of A. K. & Co." before the firm of "A. K. & Campbell" was formed or contemplated, no promise or agreement to pay for such services or expenses by "A. K. & Campbell" being alleged or proved, except as to the charge for services as clerk. The judge charged the jury that the latter firm was not liable for plaintiff's services in behalf of "A. K. & Co.," but the jury brought in a verdict covering plaintiff's services and expenses in the purchase of goods for the contemplated firm of "A. K. & Co." of which he was a part: *Held*, that the verdict was against the evidence, contrary to law and to the charge of the court, and should be set aside and a new trial granted.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

A. A. Knight for Appellants.

C. P. Cooper for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

The case having been reached in its order, the argument upon the merits was opened by counsel for appellants. Counsel for appellee then submitted his argument and brief, in which he raised the objection that the appeal in this cause had not been taken according to the provisions

of the statute, and that this court for that reason was without jurisdiction. We feel strongly inclined to reprehend this course. It was the duty of counsel to bring such questions to the attention of the court before an entire day had been consumed in hearing the case upon the merits. It is a severe trial upon the frailty even of judicial human nature to spring such a question in the midst of the argument and open a brief upon it, thus showing that the alleged defect was known in advance.

As a question of jurisdiction is suggested we will consider it.

Upon the overruling of a motion for a new trial, the judge allowed an entry to be made in the minutes giving thirty days to perfect an appeal. The statute allowed ten days after the close of the term to take an appeal in cases at law, and the appeal not having been perfected by giving the bond within the ten days, the judge thereafter properly declined to approve the bond, (though the appeal had been prayed in open court,) on the ground that the time had expired. The Legislature, being in session, passed an act to extend the time within which appeals can be taken to thirty days, (Ch. 3008, Laws of 1877,) and provided that it should "relate to all cases wherein appeals have been made, attempted, or sought to have been made, within thirty days from the passage of this act." Under this act the appellant filed his bond for appeal, which was approved, and upon the appeal so made the record is brought here.

The question involves the power of the Legislature to revive a right of appeal after the time has expired.

This matter has been so thoroughly discussed by the courts of various States that we are not required to treat it as an original question.

In Commonwealth vs. McGowan, 4 Bibb, 62, the court remarks: "The remedy only being barred, the legislature

were competent to remove the obstacle by furnishing a new remedy; and whether this is done by a repeal of the statute, or by giving a new law posterior and consequently paramount to the old one, cannot be material in testing their power to do so." S. P. Graves vs. Graves, 2 Bibb, 207.

In the case of Davis vs. Ballard, (1 J. J. Marshall, 563,) a judgment was rendered in March, 1823, and in March, 1827, a writ of error was sued out, the law allowing three years only for that purpose. In January, 1827, the legislature enacted that the period of time between November 31, 1824, and April, 1827, should "be deducted from the time allowed by law in any plea, motion or suit, in which the statute of limitation of writs of error may be plead or relied on." The court in a long and very able opinion, while condemning "retrospective legislation," upholds the right of the legislature to regulate the practice and proceedings in the courts of justice, and sustains the act. It disturbs no vested right of property.

In Henderson & Nashville R. R. Co. vs. Dickerson, 17 Kentucky, (B. Munroe, 173,) an appeal was dismissed because not taken in time. Subsequently the legislature passed another act extending the time of appeal in such cases, and a second appeal under the later act was sustained.

In Alabama the decree of a Probate Court was rendered in November, 1864, and the statutory time for appealing had elapsed in 1866, when the legislature passed an act that from any decree of a Court of Probate rendered between January 11, 1861, and September 25, 1865, an appeal might be taken six months from the passage of the act. The Supreme Court remarks that the establishment, repeal or alteration of the law of limitation as to time of appeals to the Supreme Court, is not referable to an authority to affect the jurisdiction of this court as established by the constitution. The fixing and altering of the period of limitation to appeal is but an exercise of the power to regulate the juris-

diction of this court, not the assumption of control over it. The power of the legislature to pass any law affecting a title to property is denied as standing upon a different principle. Page and wife vs. Matthew's administrator, 40 Ala., 547.

This case is very similar to the case at bar. We are not called upon to decide how far the Legislature may go in reviving a right of action upon a *claim barred* by the statute of limitations. In Bradford vs. Shine, (13 Florida,) this court held that the Legislature might repeal a statute of limitations before it had fully run upon a claim, and thus deprive a party of its benefit; and that as to the "statute of non-claim," a repeal *after* the statute had attached, did not revive the right to prosecute, the claim being "barred." We cannot discuss the question here for it is not raised.

The limitation of the time for procuring a writ of error was fixed by law at two years. This was the law in existence in 1870 when the "Code" was introduced, which superseded the former practice and provided that an appeal might be taken within two years after judgment. It was never questioned that as to all cases pending, the right to a writ of error was taken away, and that the party was entitled to an appeal within two years from the entry of judgment. Now the time for suing out a writ of error in the case at bar is two years under the existing law. The writ of error is a means of bringing before the appellate court the proceedings of the inferior court. The time, therefore, within which the parties in the present case might bring their case up for review is two years. Can it be questioned that the legislature might extend the time for review by means of an appeal to the full term of two years, even without repealing or taking away the writ of error, but leaving both remedies to stand and leaving parties to pursue either of these methods as might be convenient? In the light of past legislation and the practice of the courts, we cannot permit a doubt to prevail. The act in question

scarcely comes within the definition of retroactive legislation. It merely permits a party to bring up a cause for review, within the time already provided, by a process different from that already allowed, but not infringing any rights of property already established.

This cause is therefore properly before this court upon the appeal perfected within thirty days after the expiration of the term of the Circuit Court.

This is an action of assumpsit brought by Little against the defendants, appellants, as partners. The defendants pleaded the general issue and a set off.

The facts as shown by the record are:

That in 1875 plaintiff made an arrangement with Alvord and Kellogg, two of the defendants, to form a partnership in the name of Alvord, Kellogg & Co. in certain mercantile business at Jacksonville, the preliminary agreement being that each party should raise a certain sum of money with which goods were to be purchased. The parties afterwards proceeded to New York, where they met and proceeded to make some of their contemplated purchases, but while in New York plaintiff, finding that he had been disappointed in regard to funds, and Alvord being unwilling to proceed unless plaintiff raised his share of the capital, it was concluded that the enterprise should be abandoned.

Some of the goods that had been purchased in the name of "Alvord, Kellogg & Co." had been forwarded to Jacksonville, and other purchases were countermanded. Before plaintiff had proceeded to New York, and in pursuance of the original agreement, he had attended a sale of the effects of a bankrupt estate and purchased in the name of the contemplated firm a lease-hold interest in a store and a few hundred dollars worth of goods, which were paid for with money advanced by Alvord & Kellogg, and had advanced a small sum to pay for insurance thereon.

Afterwards, in December, 1875, Alvord & Kellogg

formed a copartnership in the same business with Campbell, under the name of Alvord, Kellogg & Campbell.

The goods purchased in New York by the inchoate firm of which plaintiff was a member were paid for by Alvord, and put into the stock of the new firm to his credit, the property purchased in Jacksonville being also put into the stock of the new firm by Alvord & Kellogg.

When the firm of Alvord, Kellogg & Campbell commenced business in December, 1875, they employed plaintiff to assist them in opening and marking the goods and arranging the store, and he continued in their employ until March, 1876.

This suit is brought against the members of the firm of Alvord, Kellogg & Campbell upon an account, stated as follows:

For expenses incurred in purchasing store and stock from assignee in July, 1875.....	$27.50
For expenses to New York and return, and expenses in New York, cash paid out.....	220.00
For labor in purchasing stock in New York.....	125.00
For cash paid for insurance on $1,000.....	25.00
For cash paid for three months' ground rent.....	75.00
For services in arranging and marking stock from December 27, 1875, to March 4, 1876.....	300.00
For one-third profit on merchandise and fixtures..	150.00

The facts as above detailed appear by the evidence on the trial. Plaintiff testified to the correctness of the several items of the account, except the last item of $150, and claimed that the firm of Alvord, Kellogg & Campbell owed him thereon $772.50, subject to their account against him of $202.95. He testifies that his services from December to March were worth $300. Alvord and Campbell testify that the services were worth not to exceed $150. There is no testimony whatever tending to charge Alvord, Kellogg & Campbell with any liability for any other item.

of the claim, excepting the services from December to March. Plaintiff says. in his testimony, that he "claims that they owe" him these several amounts. The defendants each deny that they employed him or promised to pay him, except for his services as clerk for the time mentioned. The plaintiff does not testify that they did promise to pay him, nor does he state any fact or conversation with defendants in regard to their liability for any other item, except for such services as clerk.

The charge of the court to the jury is not given in the record, beyond certain propositions submitted by both parties in regard to the law of partnership and the liability of partners, not very material to the issues presented and given to the jury, and the following proposition presented by defendants' counsel, to wit: that the firm of "Alvord, Kellogg & Campbell" are not liable to the plaintiff for any claim he may have against the firm, or the members of the firm of "Alvord, Kellogg & Co.," was given by the court to the jury.

The jury returned a verdict for the plaintiff for three hundred dollars.

Defendants then moved to set aside the verdict and for a new trial, upon the ground that the verdict was contrary to the evidence; contrary to the charge of the court, to the weight of the evidence; that the charge of the court was conflicting and misleading; and because the jury took with them to the jury room the declaration and the plaintiff's bill of particulars, and did not take the defendants' plea. The court overruled the motion, and defendants excepted. Judgment was entered upon the verdict and for costs against the defendants.

The grounds of the motion for a new trial, that the verdict was directly contrary to the evidence and to the charge of the court, are the only ones available, as the case is presented to this court. It certainly requires no argument or

references to the books to show that Alvord, Kellogg & Campbell, the defendants in this suit, are not liable to this plaintiff for any services or moneys expended by him for and in behalf of the contemplated firm of Alvord, Kellogg & Co. (of which the plaintiff was a party in interest). There could be no liability for such services or expenditures, unless they made themselves liable by some agreement or promise to that effect. There is no pretence of any such promise.

Plaintiff in purchasing and insuring the goods at Jacksonville, in going to New York and purchasing goods for Alvord, Kellogg & Co., was performing services and expending money for himself and his intended partners, and if he has any demand for this it is not against the firm of Alvord, Kellogg & Campbell, which was formed afterwards, and with whom he had no transactions, except to assist the new firm in the capacity of a clerk. And there being no testitimony whatever tending to charge these defendants with anything beyond the value of these services as an employee, the utmost that could be allowed him was the value of such labor, estimated by him at $300, and by defendants at $150, against which he admits an offset of over $200.

This verdict of $300 was therefore entirely unwarranted by the evidence, and was directly against it, and against the instruction given by the court, and against the law, and not merely against the weight of evidence. It is a verdict against A. for the alleged indebtedness of B.

The legal inference, from this proposition, and in view of the facts as proven, is that the verdict was based upon some influence other than that which should have been produced by the very plain and simple proofs before us in this record. We are always reluctant to set aside the verdict of a jury, and have never done so except in very plain cases of the violation of proper rules of law or the palpable disregard of the facts as they are shown to us, and we will not do so in any case merely because we do not agree with the jury in

weighing the evidence. In this case there is no aspect in which the facts as presented, under the charge of the judge, can be made to produce this verdict without violating the plainest principles of justice. The rule as laid down by this court in Schultz vs. The Pacific Insurance Co., (14 Fla.) and in several other cases found in our reports, requires that this verdict be set aside as against evidence and in violation of the law. There is, moreover, some ground to apprehend that the jury were led into error by the instructions given them at the request of counsel, upon matters not pertinent or proper for their consideration, and tending to confuse the minds of the jurors and divert them from the real issue in the case.

The judgment is reversed, and a new trial must be granted.

PAUL B. CANOVA, APPELLANT, VS. COLBY AND GOULD, APPELLEES.

1. The trial of the issues of fact upon the traverse of the affidavit upon which a writ of attachment was issued, if a jury be demanded, must be had in the county where the suit is pending.
2. *Semble*: That the affirmative of the issues of fact upon such traverse is with the plaintiff; he must prove the truth of the allegation in the affidavit to the satisfaction of the court or jury, in order to sustain his writ.

Appeal from the Circuit Court for Baker county.

The facts of the case are stated in the opinion of the court.

A. A. Knight for Appellant.

E. M. Thompson for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

Appellant commenced his suit in the Circuit Court for Baker county by writ of attachment. Defendants traversed the allegations in the affidavit upon which the attachment issued, denying the special causes alleged, and brought his motion to dissolve the attachment before the Judge while the Circuit Court was in session in Duval county. The court ordered that the issues of fact be tried by a jury, and empanelled a jury in Duval county, during the term in Duval county, who heard the proofs of the parties and rendered a verdict in favor of defendants, whereupon the Judge rendered his judgment upon said verdict dissolving the attachment and dismissing the suit. He then directed the Clerk of Duval county to certify the proceedings had before the court and jury in Duval, together with all the papers filed in Duval county relating to the case, and transmit them to the Clerk of Baker county; and "that the judgment rendered in the said cause in Duval county on the 23d day of January, A. D. 1877, be entered by the said Clerk in the records of Baker county." Whereupon the judgment was entered of record in Baker county dismissing the suit.

The appellant, before the proceedings had by the court and jury in Duval county, objected to the trial being had in that county, and duly excepted thereto. After the verdict, he also moved to set aside the verdict and for a new trial, which was refused.

This appeal is from the judgment entered in the Circuit Court in Baker county.

The only question necessarily presented is, whether the issue was properly tried before a jury in Duval, the cause having been commenced in Baker, and the venue being there at the time of the trial.

The statute (Thomp. Dig., 369,) says that "the courts respectively to which such attachments are returnable shall

be always open for the purpose of hearing and deciding motions for dissolving such attachments, and in any such case, upon oath made and tendered to the court that the allegations in the plaintiff's affidavit are untrue," as to the causes alleged, "it shall be the duty of the court to hear evidence upon the issue so presented, and if, in the opinion of the court the allegations in the plaintiff's affidavit are not sustained and proved to be true, the attachment shall be dissolved," and if the attachment be dissolved before plea, the suit shall abate and be dismissed. Either party may demand a jury upon the issue of fact.

The law relating to the commencement of suits, (Thomp. Dig., 326,) requires that the summons shall be made returnable to the court having jurisdiction in the county in which the defendant reside or the cause of action accrued, and the cause shall not be tried in any other county unless the venue be changed according to law. There is no statutory authority for trying any cause at law by a jury in any other county that that in which the venue is laid; juries are summoned to serve in the court held for the county, and not to try causes pending in other counties. Every suitor has the right to demand that his cause be tried in the county where it is pending, and may well protest against being compelled to follow the opposing party to any county in the circuit, and be subjected to the expense of transporting witnesses and paying charges for subsistence for himself and witnesses at the pleasure of his opponent. He may protest that such practice is in violation of one of the most valuable rights secured by *magna charta*. "With regard to the administration of justice, besides prohibiting all denials and delays of it, it fixed the Court of Common Pleas at Westminister, that the suitors might no longer be harrassed with following the King's person in all his progress, and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper

counties and establishing annual circuits." 4 Black. Com., 424.

The provision of the statute that the court shall be always open for the hearing of motions for dissolving attachments, does not imply that the cause or any issue arising in it may be tried by a jury of any other county than that in which the law directs the cause to be tried. The party is entitled to a jury contemplated by the law fixing the venue; a jury of the vicinage and not a jury of strangers.

There is no provision of law by which the proceedings had in the Circuit Court of Duval may be incorporated into and made a record of the court in Baker county. The verdict of a jury empanelled in one county, upon which a judgment is to be entered in another county, is an anomaly in judicial proceedings and unauthorized by any law of the State. It is an error for which the judgment will be reversed on error or appeal, though the judgment, until reversed, will be effective, as the erroneous proceeding does not affect the jurisdiction of the court rendering the judgment.

The statute seems to contemplate that in such issues the defendant in attachment shall have a speedy trial, and by a jury, if either party desires it; but unless the Judge shall go to the county where the venue is laid, it is difficult to find any means of obtaining a jury. There is no question that the Judge may hear and decide the motion at any time or place in his circuit, if no jury is required.

A further question is made that the court erred in requiring the plaintiff to maintain the allegation made in the affidavit upon which the writ was issued by proofs, the appellant insisting that the affirmative of the issue, upon the defendants' traverse, was with the defendants. As the present case is disposed of by our conclusions upon the other question, it is unnecessary to consider this ground of error at length. The statute says that "if in the

court the allegations in the plaintiff's affidavit are not sustained and *proved to be true,* the said attachment shall be dissolved." The court is "to hear evidence upon the issue so presented," and make up his judgment upon it. We are strongly impressed that unless some *evidence* is presented *to sustain* the allegations in the plaintiff's affidavit, the attachment must be dissolved. This seems to require some evidence beyond the affidavit itself to sustain its allegations.

The judgment is reversed, and the proceedings had in Duval county must be set aside.

THE COUNTY OF NASSAU, APPELLANT, VS. MARK W. DOWNIE, APPELLEE.

1. In 1876 there was no statute making a bill incurred for the board of jurors engaged in the trial of a capital felony a charge against the county in which the trial happened, nor was the board of bailiffs in whose charge such jurors were a charge against the county.

2. In order to constitute a charge against a county, the thing for which it was incurred must be authorized by law. No officer can bind either the state or county, unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced.

Appeal from the Circuit Court for Nassau county.

Downie, the appellee, recovered judgment against the county of Nassau for $655.40, and the county appealed. The other facts necessary to the full understanding of the opinion of the Court are stated in it.

John Friend for Appellant.

Cooper & Ledwith for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

At the spring term, A. D. 1876, of the Circuit Court for Nassau county, in the trial of Harney Richard, charged with a capital felony, the jury, by order of the court, were kept together, and under the order of the court, the sheriff fnrnished board to the jury and to the two bailiffs in charge. This is an action of assumpsit brought by respondent against the county of Nassau for thirteen and one-fourth (13¼) days] "board" of these jurors and bailiffs, his bill being approved by the Judge of the Circuit Court for the sum of $618.30.

The simple question here is, is the county of Nassau liable for this bill?

First. As to the matter of the board of bailiffs.

Under Chapter 1981, page 36, Acts of 1874, the law controlling the subject, the sheriff is allowed "for actual and necessary expenses incurred in the arrest, safekeeping or punishment of prisoners or criminals, such allowance as either the judge or the justice from whose court the process issues, shall deem just; *provided, however,* that there shall not be allowed for bailiffs more than one dollar per day." As we show in the subsequent portion of this opinion, this is the only statute then controlling the subject, the act of 1825,chapter 45, page 118, Acts, having, in so far as this matter is concerned, been repealed by chapter 1815, and not revived by chapter 1981. Under this act it is contemplated that the bailiff will board himself. The sheriff, as the representative of the county or State, (it is unnecessary to decide which,) is authorized to employ a bailiff at a stated price. The expense of the board of this bailiff is a necessary expense of his own. It is no more an expense of the court, contingent or otherwise, within the meaning of the statute, than is the board of the sheriff or clerk. The sheriff is authorized to incur expense for the per diem of a bailiff;

he is not authorized to pay a per diem and his board. This is a charge not authorized by law, and no officer can bind either the State or county, except where there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced.

Second. As to the matter of the board of jurors.

Some of the earlier statutes may have permitted a construction which would have authorized the sheriff to incur and the Judge to allow this expense, (chap.47,Laws, Thomp. Dig., 438 and 9;) but the act approved June 6, 1870, Chap. 1815, which was an act regulating the pay of jurors and witnesses, as well as the matter of the contingent expenses of the courts and the pay of sheriffs, expressly provided that it should "be unlawful for any officer to charge or collect a greater sum of money than herein authorized to be charged for the services herein designated, *or to make any charge whatever except that in this section prescribed.*" Under this act, so far as contingent expenses were concerned, the sheriff was allowed ouly such actual and necessary expenses as he incurred in the "*arrest, safe-keeping* and *punishment* of criminals," as the judge from whose court the process issued suould deem just. It is plain that the pay for board of jurors was not within the meaning of this act. An expense incurred in the arrest or safe-keeping of a criminal, and the term punishment here, meaning simply the execution of the sentence of the court, the expenses of a jury's board was not an expense, either actual or necessary, connected therewith. The board of a jury is not an expense incurred in the execution of the sentence of a court; in other words, the punishment of the prisoner. It has nothing to do with it; much less indeed than the board of the sheriff himself. This act, in addition, provided a per diem and mileage to be paid a juror for his services at the court, and for such service no one was authorized "to make any charge whatever," except as pre-

scribed in that act. This act was the result of a revision of all the acts upon the subject.

This act, (chapter 1815) without reviving (Thomp. Dig., 22) any antecedent act, was modified in some respects by chapter 1981, the act in force at the time this expense was incurred; but the power of the court in allowing contingent expenses, and the power of its officers in incurring such expense, was restricted, as under the previous act, to such actual and necessary expenses as were incurred in the arrest, safe-keeping, or punishment of criminals. As we have before stated, the board of a juror is not such an expense, and there is no authority of law in this statute for incurring it.

It was contended in argument that bailiffs and jurors were officers within the meaning of that clause of the Constitution which requires that each county shall make provisions for the support of its own officers.

While bailiffs and jurors may be officers within the meaning of that term as used in several fee bills, yet, within the meaning of the Constitution, they are not officers, either State, county, or municipal. Sec. 27, Art. IV., of the Constitution, requires that "the Legislature shall provide for the election by the people or appontment by the Governor, of all State, county or municipal officers not otherwise provided for by this Constitution," and neither a bailiff nor a juror is an officer named in the Constitution, nor are they elected by the people or appointed by the Governor.

We have omitted intentionally the discussion of the question whether a county can be sued in this State. The conclusion we necessarily reach here is that this is no proper or legal charge against the county. Whether it is a charge against the State is a question not here involved.

The judgment for the plaintiff is reversed, and the cause will be remanded with directions to enter judgment for the defendant, with costs.

THE STATE OF FLORIDA, APPELLANT, VS. CHANDLER H. SMITH, ET ALS., APPELLEES.

1. At the date of a bond given by a Collector of Revenue, conditioned for the faithful discharge of his duties, the law provided that if any Collector should, without good and sufficient excuse, neglect to pay over, according to the requirements of law, any money collected by virtue of his office, he should be deemed guilty of embezzlement and punished by imprisonment, &c. Afterwards the Legislature repealed this law. In a suit against the Collector and his sureties upon the bond, the latter pleaded that they were discharged by such repeal, by reason that the bond was executed in view of the penal statute; that its existence was an inducement to their signing the bond, and that the repeal deprived them and the State of a remedy against the Collector to enforce payment of moneys collected by him. On demurrer to this plea, *held*: that it did not set up a defence in favor of the sureties against a breach of the condition of the bond.

2. The sureties pleaded that after the Collector had begun to neglect his duties, they demanded of the Governor that he suspend the Collector and appoint another to perform the duties under the provisions of an act of the Legislature; but the Governor neglected and refused so to do, and the default of the Collector alleged in this suit occurred subsequent to this request, whereby the obligors claim that they are not liable. On demurrer to this plea, *held*: that this plea did not set up a defence to the action; that the laches or neglect of the officer of the Government in such case did not relieve the sureties.

Appeal from the Circuit Court for Leon county.

This is a suit upon the bond of W. R. Pettes, late Collector of Revenue for the county of Leon, against the principal and sureties. The bond was dated May 13, 1872, conditioned for the faithful performance "of all the duties of said office as prescribed by law." The plaintiff avers that the collector, from the date of the bond up to February 24, 1874, did receive and collect for taxes due the State the sum of $80,133.42, of which he had neglected and refused to pay over to the proper officers of the State the sum of $5,210.92.

The defendant, Chandler H. Smith, and other sureties,

plead first, that they are the sureties of Pettes; that at the date of the bond the duties of the collector of revenue were stipulated and set forth by the laws of the State then existing, and that no other or different duties devolved upon him than those so prescribed; that on the 21st of February, 1873, the Legislature passed an act entitled "an act relating to the indebtedness of the State," without the knowledge or consent of defendants, and that by the provisions thereof the duties of the collector were greatly enlarged and varied, and laws in force, when the bond was executed, which prescribed the duties of the collector, were repealed and annulled; and that by divers acts of the Legislature, in force at the time of the execution of the bond, the duties of the collector were varied and changed without the knowledge or consent of the defendants; that by force of the several laws passed subsequently to the date of the bond, the plaintiff, without the knowledge or consent of the defendants, altered the terms, duties and conditions of the bond, and changed and enlarged the duties and responsibilities of the collector, as prescribed at the date of the bond, by providing, in the said act approved February 21, 1873, for the collection by the collector of a large additional tax in Leon county, upon the property therein, to-wit: a tax of three mills on the dollar upon the assessed value of said property to pay interest and principal of one million dollars of Florida State bonds, to be issued under said act, and imposing on said collector various additional liabilities and responsibilities.

For a *second* plea the defendants say, that at the date of said bond certain penalties were imposed and denounced against collectors in case of their default; that the existence of these penal laws was an inducement to the said defendants to sign the bond, and afforded to the plaintiff a means by which to compel the performance of duty by collectors, and was a protection to the sureties; that by an act ap-

proved February 14, 1873, and also by an act approved February 17, 1874, the said penal statutes were repealed, and plaintiff thereby abandoned and relinquished all means by which to compel the collector to discharge the duties prescribed by law, the existence of which penal laws was an essential condition of the obligation whereby, by force of the said acts of 1873 and 1874, the defendants were released and discharged as sureties.

For a *third* plea the defendants say, that at a time when the collector had failed to perform some of the duties of his office, to-wit: June 23, 1873, the said sureties demanded of the Comptroller and of the Governor of the State that the said collector be required to discharge his duties or that he be suspended or removed, as provided by law in such cases, and that some other person be designated to collect the taxes; that the Governor neglected and refused to comply with such request; that all the moneys which had come to the hands of the collector prior to such request have been paid over to the State, whereby the sureties say they were discharged of their liability.

The plaintiff demurred to the first, second and third pleas.

To the first, because it does not show what duties were prescribed by law at the date of the bond; nor what other or different duties were imposed on the collector; nor that said act of 14th February, 1873, offers any legal defence to this action; nor does the alleged imposition of additional and further duties on the collector in any manner discharge the said collector from the performance of his duties as prescribed; nor does such allegation constitute any defence to the action.

Plaintiff demurs to the *second* plea that the repeal of the statute, relating to penalties as alleged, furnishes no legal or sufficient defence; and to the *third* plea that it is insufficient, &c. Plaintiff also filed replication to each of the pleas.

The court, upon argument, sustained the demurrer to the first plea and overruled the plea, and overruled the demurrer to the second and third pleas, and sustained the pleas. The defendants excepted to the ruling of the court in sustaining the demurrer to the first plea and overruling the plea; and the plaintiff excepted to the judgment overruling the demurrers to the second and third pleas and sustaining the pleas.

The court also struck out the plaintiff's replications to the second and third pleas, to which plaintiff excepted, and judgment was rendered in favor of the defendants, the sureties, that they go hence, &c., and that the plaintiff take nothing by this action against them. Judgment was rendered against the defendant, Pettes, for the penalty of the bond, to be discharged, &c. The plaintiff appeals.

Bolling Baker for the State.

To the declaration defendants below, Smith, Meginniss, and Hodgkiss, filed four pleas, to three of which plaintiff below demurred, and to each of which there was also an replication.

Plaintiff's demurrer to defendants' first plea was sustained. The demurrers to the second and third pleas overruled by the court, and said second and third pleas sustained, and thereupon judgment was rendered for said defendants on the said second and third pleas.

To the various rulings of the court below upon all but the first plea, the plaintiff below excepted, and the said rulings and judgment thereon are now assigned for error in this court.

The principal, if not the only, question now presented in this court is, whether, supposing the matters had been well pleaded by appellees, the defences set up in the second and third pleas in the court below released them from their

liability on the bond sued on below. And the object of all the pleading of plaintiff in the court below was to arrive at an issue, upon the trial of which their liability could be tested.

To the first plea there was a demurrer, which was sustained by the court, thus disposing of the defence attempted to be set up under that plea.

To the second plea of defendants there was a demurrer which the court overruled and sustained the plea.

It was error in the court to overrule the said demurrer, because an inspection of the plea will show that it tendered no issue of fact in which plaintiff could safely join. That it was uncertain and double, and was bad in substance.

A plea is bad if double, and a pleading will be double which contains several answers, whatever be the class or quality of the answers. Stephen on Pleading, 258, and text books generally.

The first paragraph of said plea, or the clauses of said plea which contain an allegation, allege that when defendants signed the bond there existed by law certain penalties against defaulting collectors of revenue, but neither the law nor penalties are specified, so that there was nothing in those averments which plaintiff could traverse, confess, or deny, because of the generality and uncertainty of the allegations.

The second distinct allegation in said plea is that the *existence* of the *laws aforesaid* was the inducement to defendants below for signing said bond, but there were no laws specified to which the word *aforesaid* could apply. Nor was the fact of the *inducement* for signing the bond a material issue in an action on the bond, unless it was shown or alleged. 2 Paige, 497.

Each succeeding allegation of said second plea presents a different answer of a different and distinct class and quality, and the whole concludes with an allegation not of a dis-

tinct fact, but of a *legal conclusion,* assumed to result from facts defectively pleaded, or so obscurely pleaded, and with such uncertainty that no issue could be safely joined on the whole together or either fact separately.

The demurrer, therefore, was the only method of meeting the plea; and the proper judgment upon the demurrer would have been that the defendants plead over, and they should have amended the plea so that each ground of defence would have been set out distinctly, separately, and with certainty, so that plaintiff could not be forced to join in an immaterial or uncertain issue.

The demurrer to the third plea should have been sustained, for the same reasons that are stated in reference to the demurrer to the second plea, but more especially for the reason that the defence set up in said plea (if well pleaded) was, that by the failure of the Comptroller and Lieutenant-Governor of the State to comply with certain requests of defendants, they were discharged from liability on said bond, for such averments, even if true and well pleaded, furnish no defence to the action, as has been repeatedly decided. Davis vs. Huggins, 3 N. H., 231; The People vs. Russel, 4 Wend., 570; 8 N. H., 539.

In 4 Wendell, 570, the court held that the omission of the Comptroller for eight years to sue a defaulting collector was no defence to an action on the bond against the sureties.

The Supreme Court of the United States has decided that the omission of the proper officer to recall a delinquent paymaster did not discharge the sureties on his bond. United States vs. Vanzandt, 11 Wheat., 184; Dox vs. P. M. General, 1 Pet., 328, 324.

All the cases where a different doctrine was held were cases between *individuals,* and the decisions do not apply to actions on official bonds, upon the ground that the government cannot be guilty of laches, as laid down in United

States vs. Kirkpatrick, 9 Wheat., 720; Smith vs. United States, 5 Pet., 292.

And even in cases between individuals the rule is, that such is not a good defence, unless it is also *alleged* and *proven* that when the request was made the principal was solvent, and subsequently became insolvent. Mahwren vs. Parsons, 8 N. H., 539; Hoffman vs. Hubbard, 13 Wendell, 377; Davis vs. Huggins, 3 N. H., 231.

The replications to defendants' second and third pleas were good, and should not have been stricken out, because they did *traverse* each and every allegation in defendants' said pleas, and if such traverse produced an issue of law, (as was held by the court below,) then it was the fault of defendants' said pleas which tendered a conclusion of law arising out of badly pleaded facts, instead of tendering a proper issue upon the facts themselves. But the replications were true in point of fact, and did tender an issue of fact. The replications *denied* that the penalties contained in the act of 1869 did alter or discharge the condition of the bond, for the said penalties *were not* repealed until February 7, 1874, while the default complained of occurred in 1873. But the allegation of the second plea further is, that certain other acts, to wit: the acts of February 14, 1873, and the act of February 17, 1874, Chap. 1977, repealed the penalties contained in the acts which were in force when the bond was signed. Now the replication *denies this allegation*, and so raises an issue of fact to be determined by reference to the acts themselves.

But examine the acts. The act of 24th June, 1869, pamphlet acts, pages 1 to 23, and the act of 14th February, 1872, pamphlet, page 36, Chap. 1887, and the act of February 12, 1872, were the acts in force when the bond was given. The first contains penalties; the two last do not.

The first (the act of 1869) containing the penalties, was not repealed until 17th February, 1874, *after* the *default*

had occurred. In the act of 1869 the duties prescribed by the warrant to the collector, section 35, are precisely the duties prescribed by the act of 1872, section 4 of said act.

The act of February 14, 1873, Chap. 1935, passed after the bond was given, *does not* repeal the acts of 1869 and 1872, but provides that the payments by the collector shall be monthly instead of on first Monday in January, and prescribes a penalty of two years in State prison for failure to make payments or monthly returns.

The act of 21st February, 1873, provided for an additional tax of 4 mills on the dollar, (and this act which is supposed to enlarge the duties of the collector) and provided a penalty of imprisonment in the State prison of not less than two nor more than five years for failing to comply with the provisions of that act, but *did not* repeal the penalties in the act of 1869. None of the foregoing acts *alter* the duties to be performed by the collector, but only vary the manner and time of performance, except that the act of 21st February, 1873, provides for the collection of an additional 4 mills on the dollar.

The act of February 17, 1874, Chap. 1976, sec. 36, prescribes the duties to be performed by the Collector in exactly the same language as that used in section 35 of the act of 1869, and only the manner, and time, and mode of collecting are varied, (but not the duty of collecting or paying over is varied); but in no one of the acts above recited is it made *illegal* or *prohibited* to the collector to pay over to the State the amounts collected by him, as is alleged in defendants' plea.

The act above cited, February 17, 1874, repealed the act of June 24, 1869, which was in force when the bond was given, but the action in this case was not the non-performance of duties prescribed by the act of 1874, as the failures to pay over money were of the sums collected in 1872 and

1873, during the whole of which time the acts of 1869 and 1872 were in force.

The issue of fact tendered in the replications to pleas 2 and 3, would have developed the above facts; and the court erred in striking out the replications and preventing thereby such issue of fact from being tried. The court erred in not permitting the issue tendered in the replication to the fourth plea to be tried by the jury, and in ruling that the decision upon the second and third pleas made that unnecessary.

The appellant insists that there is nothing disclosed in the pleadings which should bar a recovery against defendants. And it is nowhere alleged in said pleadings that the appellant seeks to recover, or make the defendants liable for any sum beyond the penalty of their bond. Nor is it alleged or shown that any act of the Legislature imposed any liability upon defendants below which was not within the amount of the penalty of the bond. If it is contended that the importance of the additional tax of four mills in 1873 was such an alteration of the obligation of the collector as to release the sureties, then the slightest variation in the assessment annually made would invalidate the bond of every collector of revenue in the State, and no tax could be assessed to meet any emergency without the *consent* of the sureties to every bond in the State.

The case of the United States vs. Kirkpatrick, 9 Wheaton, 720, does not go to the extent of saying that every new assessment of taxes under acts passed subsequently to the making of the bond, releases the sureties by enlarging the duties of the principal.

In that case the collector had been commissioned and given bond under acts providing for a *direct tax*. The *commission* had expired, and a *new appointment* was made of the same collector, but he *gave no further bond*. In the meantime an act had been passed providing for the collec-

tion of an internal revenue tax, and in the suit on the collector's bond it was sought to charge the sureties with the amount of internal revenue tax collected under the *last* commission. The court say that the bond was given with express reference to the *first* commission; that the condition referred to direct taxes, and the court held that under the facts in that case, the sureties were not liable for the amount collected under the *new commission*. 9 Wheaton, 720.

In the case of the Exeter Bank vs. Rogers et al., 7 N. H., 21, the foregoing case from 9 Whea. was referred to and the reasons given for the decision as stated above.

In the case of the Exeter Bank vs. Rogers et al., (7.N.H., 21,) the facts were these: The Exeter Bank was incorporated in 1803 for twenty years; Rogers gave bond with security (as cashier) for the faithful performance of the duties of his office, and for the payment over of all money, etc. In 1822 an additional act of the Legislature was passed continuing the charter of the bank, and imposing other and different duties on the officers, including the cashier Rogers, and providing a penalty of $10,000 for non-performance. Rogers continued cashier until 1830 from 1809, and only gave one bond, that of 1809, being the same sued on in the above case. The court says: "The language of the condition of the bond in these cases is to have its full effect when there is nothing to restrain it (citing 12 East, 399.)" The court further says: "The recital of the condition of the bond is that Rogers had been appointed cashier, and shall faithfully discharge the duties of his office, and account for all money and other property in his keeping. The plain letter of the condition of the bond is that he shall faithfully discharge the duties of the office so long as he should hold it under the appointment. Any delinquency of Rogers while he continued in office under that appointment is within the broad terms of the condition, and it is incumbent upon defendants to show some strong ground

that the delinquencies which exist are not within the true intent and meaning of that condition. But it was contended that the additional act of the Legislature made such changes in the corporation that the sureties ought not to be answerable for the conduct of Rogers after that act took effect,but this furnishes no ground for discharging the surety in this case. We see nothing in these changed provisions that materially varies the condition of the surety, or that affords the slightest pretext for holding him discharged. If the principal had incurred all the penalties which the additional act prescribes, it would have had no more effect upon the bond than if he had incurred forfeitures to the same extent under any other law. The sureties could not have been affected by it."

Judgment was rendered against the surety. Exeter Bank vs. Rogers et al., 7 N. H., 21.

The principal ground of defence set up in the case of Pettes is precisely the same as the ground relied on in the above case, and all the authorities show that it is not a good defence.

T. W. Brevard, Jr., for Appellees.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiff assigns for error the ruling of the court overruling the demurrers to the second and third pleas, and in striking off the replications thereto.

The second plea sets up the fact that the State, plaintiff in the action, repealed the penalties prescribed against defaulting collectors; that the existence of these penalties was an inducement to the signing of the bond by the sureties; that these penal statutes afforded a protection to them and a means by which the plaintiff could compel a performance of duty on the part of the collector; that by such repeal

these means of compelling performance was relinquished; that these penal statutes were an essential condition of the obligation, and that by the repeal these sureties were discharged.

By the act of 1869, (Chap. 1,713, § 52,) it was provided that "if any collector of revenue shall, without good and sufficient excuse, neglect to pay over, according to the requirements of law, any money collected by him by virtue of his office, he shall not be entitled to the fees thereon, and shall moreover be deemed guilty of embezzlement of the money so collected," and punished by imprisonment in the State penitentiary not exceeding ten years, or by a fine.

If the collector was liable to be punished under that statute, does its repeal affect the sureties?

The penalty given by the statute in force at the time the bond was executed is not contemplated by any language used in the bond itself. That statute gives no cumulative remedy against the officer for the collection of the money remaining in his hands. It provides no means of compelling the payment of money. It is a statute against embezzlement, and its enforcement against the guilty officer is at the option of the government and not within the control of his sureties. If the statute had not been repealed, the sureties could not have demanded its enforcement before suit and judgment on the bond against all the obligors. It was held in New York, when the Legislature had provided a summary procedure against a collector by warrant, in case of his default, that the issuing of such warrant within the specified time, and its return unsatisfied, need not precede an action against the sureties on his bond. Looney vs. Hughes, 30 Barb., 605.

If this statute had not been repealed, the sureties could not plead to an action on the bond that the crime (if a crime had been committed) had not been prosecuted; that would not constitute a defence to such an action. The State is not

estopped from collecting upon the bond because it does not enforce the penalties, nor is it within the power of the sureties to compel the State to prosecute.

While it is true that there may be a moral force in the existence of the penal statute, which operates more or less upon the fears of public officers to prevent the commission of crime, it cannot be claimed that the quality of property exists in this moral power, or that the failure to prosecute deprives any party of the means of enforcing the payment of money. The legal purpose and object of the punishment is not to collect the debt but to punish the wrong-doer, and to protect the public against his evil example. The State, in repealing this penal statute, simply says it will not prosecute a certain offence by means of the criminal code. The defendants had no defence in the fact that the State did not prosecute while the law was in force, and we hear no reason for saying that the State is estopped by declaring it will not prosecute. Cooley's Con. Lim., Chap. 9, 286-7, and authorities there cited.

The power to punish an alleged crime is lodged in the State, and there is no right vested in any individual to control that power; it can be exercised or not only at the option of the State. The adoption of the doctrine suggested by this plea might be attended with serious consequences.

It would be hazardous to legislate in regard to crimes by changing the existing penalties, lest some contract between individuals or between private persons and the State might be affected.

The contract, however, was entered into with reference to the sovereign power of the State. Every statute relating to the police is subject to modification or repeal, at the will of the Legislature. Every contract is made with reference to the statutory provisions directly affecting the rights of parties, but with reference to the power of the Legislature to change the law so far as such change does not affect those

rights. Can it be possible that a mere penal statute, conferring no private right, and giving no private remedy—a statute referring entirely to the sovereign power, has any effect upon a contract like this one? If the act of the Legislature had impaired the contract, or taken away a remedy which had been available, so that the condition of the sureties was changed,and means of redress were gone or seriously impaired, they might insist that the State had lost its right to charge them.

The legislation referred to has in no way affected the rights or the remedies of the parties, and, therefore, the conclusion is that the plea does not set up any allegations of law or fact which constitute a defence to the action.

As to the third plea. This plea alleges that at a time when the collector had failed to perform his duties, and a condition of the bond had been or was being broken, these defendants requested the Governor to suspend the collector and designate some other person to perform his duties as provided by law; that the Governor neglected and refused to comply with their request. In other words, they allege that the plaintiff through its officers was guilty of laches, whereby the defendants (sureties) were damaged or their hazard increased, &c.

It has long been well settled by judicial decisions that laches cannot be imputed to government. Governments transact business through agents only, and cannot, like private persons, be subjected to the observance of such sharp and close rules of conduct as may be exacted of individuals in their commercial dealings with each other. If it were not so, by the connivance of sureties, for instance, with the agents of government, it might be made impossible to enforce the bonds of its financial officers. We can add nothing to the arguments and reasoning presented by the Supreme Court in U. S. vs. Kirkpatrick, 9 Wheat., 720; U. S. vs. Vanzandt, 11 ib., 184; Dox and others vs. The P. M. Gen'l,

1 Peters, 318; Smith vs. U. S., 5 Peters, 292, and other authorities cited by the counsel for appellant.

It is further suggested that the act of February 14, 1873, is the law under which the Governor is supposed to be invested with the power to suspend a collector of revenue for neglect of duty. This act was passed since the giving of the bond in suit, and could not have been contemplated by the sureties when they executed the bond. It is optional with the Governor by the terms of that act to exercise that power; but if he had violated a plain duty in the matter it would not discharge the sureties, according to the doctrine of the cases referred to.

It is our opinion that the matters set up in the third plea by the defendants are not available as a defence, and that the judgment of the Circuit Court in overruling the demurrers to the second and third pleas must be set aside.

As to the exception taken by the defendants to the ruling of the court sustaining the demurrer to the first plea, the defendants not having appealed, there is no question presented thereon by the assignment of errors.

The judgment of the Circuit Court is reversed, and the cause is remanded for such proceedings as may be had in conformity to law and practice of the court.

RICHARD JONES, PLAINTIFF IN ERROR, VS. ALEXANDER LOFTON, DEFENDANT IN ERROR.

1. The action of ejectment is one in which the plaintiff must show that he has not only the legal interest, but a possessory title in and to the premises in controversy before he will be entitled to recover.

2. In order to enable a plaintiff to recover in such an action, when his right of possession is controverted, he must prove—first, that he had

the legal title to the premises at the time of the commencement of the action; second, that he had the right of entry; and third, that the defendant, or those claiming under him, were in possession at the time the suit was commenced.

Writ of error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

Alva A. Knight for Plaintiff in Error.

In ejectment, a defendant who has ***entered forcibly*** into possession of the premises in question, is not debarred by such forcible entry from showing title in himself. The remedy of the party dispossessed, if any, is under the statute of forcible entry and detainer. Wendell's Reports, Vol. 9, Ps. 201-2-3; Jackson, ex. dem., Stansbury vs. Farmer.

This was an action of ejectment, tried at the Cayuga Circuit, in January, 1830. The lessor of the plaintiff, Stansbury, claimed to recover the possession in question on the strength of a ***possession of ten years*** previous to the 1st of May, 1829. It was proved, about the 1st of May, 1829, the defendant entered the premises forcibly, and put the wife of Stansbury out of possession. The defendant gave in evidence a deed of the premises in question from Stansbury to one Wychoff, bearing date 14th September, 1820, and a conveyance from Wychoff to himself, bearing date 21st April, 1829. This evidence was at first objected to and overruled, but subsequently, by consent of the plaintiff, it was received by the judge, and the parties went into proof on the question whether or not the defendant had ***forcibly entered into*** the posssession of the premises?

The presiding judge charged the jury that if the defendant entered without force he was entitled to a verdict, but if he ***entered with force,*** the title which he had exhibited could not avail him as a defence, and that the plaintiff in such case was entitled to his verdict.

The jury found for the plaintiff. The defendant asked for a new trial.

"*By the Court*—Nelson, J. It was decided by this court, in Hyatt vs. Wood, 4 Johns., 150, and the same principle was again applied in Ives vs. Ives, 13 id., 235, that a person having a legal right of entry in land may enter by force, and though indictable for a breach of the peace at common law, or under the statute for forcible entry and detainer, he is not liable to a private action of trespass for damages at the suit of the person in possession.

"This position, apparently harsh, and tending to the public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land. 3 Black. Comm., 5, 174; 1 Hawk., 274; 7 T. R., 43; 8 Com. Law, 280; 14 id., 59.

"It was the abuse of this summary power to right one's self by entry, where the right of entry existed, which gave rise to the numerous English statutes against forcible entry and detainer, of which our old act was substantially a copy, and in these acts and the common law remedy by indictment are to be found the only protection of the party thus forcibly dispossessed.

"They punish criminally the force,and in some cases make restitution of the possession. (11 John., 509; 13 id., 340.) But so far as the civil remedy is concerned, there is none but what is afforded by these acts.

"The act of *trespass,* like that of *ejectment,* is a possessory action involving an inquiry into the right of possession to the premises in question, and was anciently the usual mode of trying the title to land or the right in the possession, and I concur with Chief-Justice Spencer, in Jackson vs. Selye, 16 John., 200, that the principle decided in Hyatt vs. Wood is strictly applicable to the action of ejectment. Indeed this action, which was the remedy devised for a lessee of a term of years who was oûsted from his term, was originally

but an action of trespass in effect, and the recovery was in damages only for the dispossession. (3 Black. Comm., 199, 200; 2 Seld., 510.) And I can perceive no reason why the ordinary action of trespass was not used, except the difficulty which existed in the principle of that action which requires the plaintiff to sustain it to show himself in the possession of the premises in fact, or in judgment of law, at the time of the injury committed.

"A disseissee cannot maintain trespass for an injury to the freehold until he has regained the possession, and the lessee was viewed in this character afterwards. The court determined the lessee should not only recover damages, but also his term, which soon brought the action into general use. Before the action of ejectment, as now understood, came into use, this possessory right to land was tried by writ of *entry*, or an assize, and although the tenant might have entered into possession or the like, yet if he could show a right to the possession in himself, or in those under whom he made claim, he justified such entry. 3 Black. Comm.. 181, 2, 3.

"Another principle which I think applicable to the defence in this case is, that when the entry of a party is *congeable*, that is where he has a right of entry and in pursuance thereof enters into the possession of land, he is thereby remitted to his title; not so where the right of entry has been barred, though he may have the title, for then he must resort to his action. Viner's Abr., tit. Remitter, G. F.

"There are many cases in the books where the tenant in possession is estopped from setting up his title in this action, to which it is not now necessary to refer, as they have no particular bearing upon the question under consideration.

"The ground upon which I place the decision of the case is, that at common law, the party who possessed the legal right of entry might enter by force, and defend his posses-

sion under his title, subject only to an indictment for a breach of the peace, or under the statute for the forcible entry, and to a restitution of the possession by virtue of the proceedings under that statute.

"The revised statutes have extended the remedy for forcible entry and detainer, so that it now affords ample redress to every one in the peaceable possession of land, who has forcibly been dispossessed without regard to title or right to possession. (The People vs. Van Nostrand, *ante* 50.) New trial granted." Also see Daniel Hartley, appellant, vs. Lawrence J. Ferrell, appellee, 9 Fla., 374-5-7.

"A plaintiff in ejectment is required in the first instance only to show a legal title, and a right of entry under it, in order to drive the defendant to the exhibition of a paramount title."

"A purchaser at a sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution, or *possession since the rendition of the judgment,* and the *onus probandi* is cast on the opposite party."

And even where the plaintiff claims under a sheriff's deed, and the action is against a *stranger* to the execution, all that is required of the plaintiff in order to sustain the deed is to make due proof of the judgment and execution. Hartley vs. Ferrell, 9 Fla., 376; Davis vs. Shuler, 14 Fla., 448.

T. A. McDonnell for Defendant in Error.

This is a writ of error from a judgment rendered in an action of ejectment brought by Richard Jones against Alexander Lofton to recover certain lands in Duval county. The defendant pleaded the general issue, and the cause proceeded to trial.

The plaintiff, upon the trial, claimed under a sheriff's

deed, producing the deed and the execution under which the land sold, but failed to prove title in the defendant in execution or possession since the rendition of the judgment. The defendant offering no evidence, the case was submitted to the jury under the charge of the court.

The court charged the jury that a purchaser at a sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution or possession since the rendition of the judgment, and the *onus probandi* is cast on the opposite party.

The plaintiff having failed to show title in the defendant in execution or possession since the rendition of the judgment, the jury, under the charge of the court, rendered a verdict for the defendant not guilty.

A motion for a new trial denied, and a judgment entered upon the verdict. To which ruling the plaintiff excepted, and the cause is now before the Supreme Court on said exception.

Defendant relies on the decision of the Supreme Court, State of Florida, Hartley vs. Ferrell, vol. 9th, 374: "A purchaser at a sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution or possession since the rendition of the judgment, and the *onus probandi* is cast on the opposite party." Defendant failed to prove either one or the other.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action of ejectment brought by Jones against Lofton, to recover possession of a lot in the city of Jacksonville. The declaration was filed May 25, 1876. The defendant put in a plea of not guilty, and the cause was tried at the January term, 1877, of the Fourth Judicial Circuit for Duval county. The jury found for the defendant, and on

the 29th day of January, 1877, judgment upon such verdict was duly entered.

The plaintiff, on the trial to establish his right of action, introduced as evidence—First. A deed for the premises described in the declaration from John S. Driggs, Special Master, to the plaintiff Jones, dated the 2d day of March, 1875, reciting that the sale of the premises was made at public auction and by virtue of a final decree of foreclosure made in the Circuit Court for the Fourth Judicial District for Duval county, on the 6th day of January, 1875, in a cause wherein Samuel C. Thompson was complainant, and Francis W. Solana and his wife were defendants; and that the plaintiff Jones was the purchaser at such sale. Second. The final decree of foreclosure and sale recited in such deed, and up on which the sale of the said premises was made by John S. Driggs, Special Master in Chancery, therein and thereby appointed. Richard Jones, the plaintiff, in his own behalf, testified: "He is familiar with the premises mentioned in the pleadings, and for which he has had this suit in ejectment brought against the defendant; he is not certain as to the number of the block or number of the lot; they are the same premises from which John H. Brown, deputy sheriff, removed me in a case of unlawful entry and detainer." John H. Brown, a witness for the plaintiff, testified as follows: "I know the premises in controversy; as deputy sheriff I had a writ of possession placed in my hands commanding me to put Alexander Lofton in possession of lot 6 of block 59, Jacksonville, Florida, which covers the premises in controversy. The following is the return I made upon the writ:

"Received this writ January 10, 1876; executed the same January 11, 1876, by delivering to the within named Alexander Lofton the possession of the within described property, together with the appurtenances therein as described

in said writ, in the county of Duval and State of Florida.

"(Signed) JNO. S. DRIGGS,
Sheriff D. C.
"By JOHN H. BROWN, Deputy.

"Richard Jones, plaintiff, was in possession at the time said writ was filed."

This was all the evidence introduced by the plaintiff; the defendant offered no proof; no exceptions were taken to the charge of the court.

The plaintiff moved for a new trial for the reasons "that the verdict was contrary to the evidence and to the charge of the court." The court denied the motion, and the plaintiff brings the case here by writ of error.

The action of ejectment is one in which the plaintiff must show that he has not only the legal interest, but a possessory title in and to the premises in controversy, before he will be entitled to recover. The plea of not guilty puts in issue all of the allegations contained in the declaration, and it is not incumbent upon the defendant to show title or right of possession until the claimant has made out his case. In order therefore to enable the plaintiff to recover, when his right of possession is thus controverted, he must prove—1st, that he had the legal estate in the premises at the time of the commencement of the action; 2d, that he had the right of entry, and 3d, that the defendant or those claiming under him, were in possession at the time the suit was commenced. Greenleaf's Ev., § 304; Adams on Ejectment, 247; Daniel vs. Lefevre, 19 Ark., 201.

Has the plaintiff complied with these requirements? The deed from the special master in chancery, conveying to him the premises he seeks to recover, seems to be in legal form, and was not objected to. The decree of foreclosure of the mortgage given by Solana and wife to Thompson is also in evidence without objection, and it may be reasonably concluded, so far as plaintiff's right to recover is concerned,

that the title is vested in him. Then has he the right of entry? He must not only show his deed and the execution under which the land was sold to entitle him to such right of entry, but he must prove title in the defendant in execution or possession since the rendition of the judgment, and then the *onus probandi* is cast on the opposite party. Hartley vs. Ferrell, 9 Fla., 374.

Solana and his wife were the defendants in the foreclosure case, and Jones was the purchaser at the master's sale under the decree; he was a stranger to the proceedings by virtue of which the premises were sold. He proved no title in the defendants in execution, and no evidence of his *legal* possession subsequent to his purchase. All the evidence of possession is uncertain, and it appears if he had any possession at all it was wrongful, as he was lawfully ousted under the forcible entry and detainer act. The jury passed upon that evidence, and by their verdict, under the charge of the court, which is not excepted to, found for the defendant. The court also, in denying the motion for a new trial, acquiesced in the finding of the jury upon that question of fact, which seems to have been fairly presented to them in the charge.

A still more serious objection to the plaintiffs' recovery in this action, upon his case as presented, appears in this, that he failed to prove the defendant in possession of the premises claimed at the time of the commencement of the action. The plea of not guilty puts the allegation of defendant's possession in issue, and it is as necessary to prove such possession before a recovery can be had, as it is to prove the legal title and the right of entry.

This action was commenced on the 25th of May, 1876, and the proof only shows Lofton in possession by virtue of proceedings under the "forcible entry and detainer" act on the 11th day of January previous. The question of possession by the defendant at the time of the commencement of

the action was not in the case of Hartley vs. Ferrell, above cited, and consequently was not passed upon by the court in its opinion. See cases above cited; and also VanHorn vs. Everson, 13 Barbour, 526; Jackson vs. Ives, 9 Cowen, 661.

The judgment of the court below is affirmed.

WILLIAM SEDGWICK, PLAINTIFF AND APPELLANT, VS. DE WITT C. DAWKINS, DEFENDANT AND RESPONDENT.

1. A motion in arrest of judgment made at one term cannot (under the statutes of this State,) be changed by amendment, or otherwise, at a subsequent term into a motion for a new trial.

2. A court of record has inherent power to correct the mistakes of its officers, so that its record may speak the truth as to its action. Clerks of the Circuit Court have no authority to enter a judgment, after the expiration of the term, upon a verdict rendered in term. Such an entry, though placed in the minutes as being rendered during term, may be inquired into by the court at a subsequent term, and if no such judgment was rendered by the court, such entry should be corrected. The corrections may be made upon parol evidence, and the presumption in this court is that there was sufficient to justify the action of the Circuit Court.

Appeal from the Circuit Court for Duval county.

This is an action of ejectment brought by Sedgwick against Dawkins to spring term, A. D. 1870, of the Circuit Court for the Fourth Judicial Circuit of Florida, Duval county. At that term there was trial and verdict for the plaintiff. The defendant, within four days after the verdict, entered a motion in arrest of judgment, which the court continued. No supersedeas was ordered by the court. Upon the record is a judgment, regular in form, purporting to have been entered on the same day that the verdict was rendered.

Afterwards, and on the third day of June, A. D. 1870, follows an order of adjournment for the term, and to this as the last entry in the minutes is the signature of the judge. After this adjournment for the term, and on the fourteenth day of June, A. D. 1870, the defendant notified the clerk "not to enter up any judgment in the case until instructed by the judge so to do, as no judgment has been entered in term." The clerk, paying no attention to the notice, issued on the same day a writ of *habere facias possessionem,* and the plaintiff was put in possession. The defendant then filed a petition before the judge, setting up the fact that no judgment was entered until after the adjournment of the court for the term, and alleging that he had filed a bill for an injunction to stay proceedings at law. On the fifteenth of June, the judge ordered the sheriff "to suspend the writ until further orders." This order was subsequently revoked. At the succeeding fall term of the court, the defendant moved the court to correct the entry of the judgment and to re-instate the case upon the docket, upon the ground that it was not regularly rendered and entered upon the minutes, or judgment record, in term," and because it "appears of record that it was entered by the clerk out of term, ten days after the adjournment, and against the consent of the defendant." The court, after hearing, found that no judgment "was taken, ordered or rendered in term;" that what purported to be a final judgment of the court, was entered by the clerk eleven days after the adjournment for the term, ordered a restitution of the premises to the defendant and re-instated the case upon the docket. The case being re-instated, the defendant moved to amend his pending motion in arrest of judgment, and to file in lieu thereof a motion to set aside the verdict and for a new trial.

The defendant was permitted to substitute a motion to set aside the verdict and for a new trial for the motion in

arrest of judgment. After hearing, a new trial was granted. To these orders of the court the plaintiff excepted. His exceptions were noted and signed, and are regularly in the record. There was a trial with verdict for the defendant. A motion by the plaintiff for a new trial was denied, and there was final judgment for the defendant. There is no bill of exceptions in the record containing any of the evidence presented upon either trial. Exceptions were taken to the order of the court reinstating the case, granting permission to file the motion for new trial in lieu of the motion in arrest of judgment, and to the order granting a new trial. From this final judgment, the plaintiff prosecutes this appeal, taken under the provisions of the Code of Procedure.

H. Bisbee, Jr., for Appellants.

C. P. Cooper for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In the absence of a bill of exceptions or case, this court cannot consider any matter of evidence, or of law, in the shape of instructions based upon evidence, where a knowledge of the evidence is necessary to determine its application or correctness. The evidence heard upon either of the trials, or which was considered in the disposition of the several motions in this case, is, for this reason, not before us for consideration.

Under these circumstances, the presumption of law is that there was evidence to justify the action of the court in all matters where there was an issue of fact presented for its consideration. In the absence of a bill of exceptions, we are restricted to errors apparent upon the record, the general rule being that whenever the error is apparent upon the record, it is open to revision, whether it be made to appear by bill of

exceptions, or otherwise. 20 How., 433; 5 Fla., 465; 11 How., 669; 6 Cranch, 221; 4 How., 131; 6 Wheat., 410. Whether it is necessary under the code to note exceptions to the action of the court involving errors apparent upon the record, it is unnecessary to consider here, as we have here exceptions to all of the material action of the court subsequent to what purports to have been a judgment at the term at which the first trial occurred. As to the action of the court at the succeeding fall term, it is here properly presented for consideration. Thus disposing of the only questions of practice which can be suggested as to this final judgment, we reach the questions presented for consideration by this record.

As to the last and final judgment of the court, we examine but one question.

A motion in arrest of judgment was made at spring term, A. D. 1870. This motion was continued, and at fall term, A. D. 1870, the court, upon motion of the defendant, permitted him to substitute for this motion in arrest of judgment a motion for a new trial. This motion was heard and granted, and upon the new trial this final judgment was rendered. This substitution of a motion for a new trial for the motion in arrest of judgment, after the expiration of the term at which the verdict was rendered, is clearly erroneous.

This action of the court and its result, the subsequent new trial and judgment, cannot be sustained.

A motion in arrest of judgment, made at a past term of the court, cannot be changed by amendment, or otherwise, at a subsequent term, into a motion for a new trial. The statute regulating the practice in this respect provides: "That no motion for a new trial, or in arrest of judgment, shall be made, unless the party intending to make the same shall file his reasons with the clerk in writing, and cause his motion to be placed upon the motion docket within four

days after the verdict shall have been rendered, and during the same term; nor shall a motion for a new trial, or in arrest of judgment, standing over from one term to another, operate as a supersedeas unless so ordered by the court." Thomp. Dig., 351.

The motion for a new trial here was not placed on the motion docket until after the term had expired. The motion made at the term of the trial was in arrest of judgment. At the second term the defendant was restricted to this motion, and however he may have amended by adding new and additional grounds applicable to the motion in arrest of judgment, he could not file "in lieu of it" a motion for new trial. This the statute clearly prohibits. The necessary consequence is that this final judgment must be reversed and the case remanded to stand upon the motion in arrest of judgment, unless the action of the court in setting aside what is claimed was a final judgment, duly rendered at Spring Term, 1870, was erroneous. This is the only remaining question.

It appears from the record that the court, upon motion of the defendant, set aside what purported to be a judgment, regularly entered, upon the ground that no such judgment "was taken, ordered or rendered in term, and because, what purported to be a final judgment of the court, was entered by the clerk eleven days after the adjournment for the term." The power and duty of the court thus to make its record speak the truth is here questioned by the appellant. It is insisted that after the adjournment of the court for the term, it was beyond its power thus to open a judgment appearing regular upon the minutes of the court.

When a final judgment has once been pronounced, and the term at which it is given has expired, neither the court nor the parties to the record have any longer any power or control over it. It then becomes a public judicial record, stamped with the seal of finality and truth, not to be affect-

ed except when assailed upon the ground of fraud, want of jurisdiction, or other like ground. This is the frequently announced doctrine of this court. Its application to this case, however, is not seen.

What is here affected by the action of the court after expiration of the term is not a judgment of the court; it is an act of the clerk not authorized by law. 9 Cal., 173; 3 Texas, 515; 7 Cal., 53; 1 Cal., 429. There is nothing in this record which brings up any of the evidence heard by the court upon this motion. Unless the record shows clearly error in matter of fact, the rule in such a case as this is that the finding of the court must be sustained. 8 Cush., 317; 2 Cush., 124; 14 John., 219; 2 Cowen, 410; 7 Cowen, 344; 7 Cush., 282; 7 Gray, 172.

The fact here, therefore, as we must consider it, is, that the clerk, after the adjournment for the term and in vacation, enters in form a judgment in a case where no judgment was rendered in term by the court. Such an act as this cannot be protected by interposing the sanctity and verity of a judicial record. The power which the court here exercised is the universally conceded power of the court to make the record speak the truth as to its own act. The court cannot be thus estopped from inquiring whether this entry speaks the truth. Its power to perfect the proceedings according to the truth as it existed at the time of the adjournment for the term is full and complete, and the fact that verity attaches to an act of the court is a strong reason for giving enlarged powers to ascertain whether, what purports to be an act of the court, was such. 6 Cush., 354; 7 Cush., 282; 8 Cush., 317; 14 Ark., 206; 4 Eng., 188; 6 Tenn., 8; 7 Tenn., 699; 17 Ark., 100; 3 Cowen, 44; 4 M. & S., 94; 1 Pick., 351; 3 John., 526; 4 Cowen, 71.

Neither this court nor the Circuit Court can obviate or disregard the necessary legal result of the failure of the defendant to enter his motion for a new trial at the term of

the trial. His motion at the subsequent term was too late. It is expressly forbidden by the statutes. The Circuit Court should have restricted the defendant to his motion in arrest of judgment. If the defendant was entitled to a new trial he has failed to get it by his own laches, which neither this court nor the Circuit Court can remedy.

The final judgment herein rendered, the order permitting the defendant to file a motion for a new trial after the expiration of the term at which the trial was had, and the order granting a new trial, are reversed, and the case is remanded to stand for hearing upon the motion in arrest of judgment. The costs to be paid equally by the parties.

THE MUTUAL LOAN AND BUILDING ASSOCIATION, PLAINTIFF AND APPELLEE, VS. MILES AND JOHN PRICE, DEFENDANTS AND APPELLANTS.

1. Sureties on the bond of an officer of a private corporation whose office is annual, with power in him to hold until his successor is elected and qualified, are bound only for the year for which he was chosen and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer. Guaranteeing the good faith and honesty of such officer "during his continuance in office," means not an indefinite period, or for the time he may possibly hold such office by new elections, but his continuance in office under his then election and for the legal term.

2. Sureties upon such bond are not discharged by the neglect of the officers of the corporation to have, as prescribed by the constitution and by-laws of the corporation, periodical examinations of the books of the officer whose sureties they are. Mere laches, unaccompanied with fraud, is no ground of discharge.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

Cooper & Ledwith for Appellant.

1870, November 18—Charles B. Graybill was elected Treasurer of the Association.

1871, June 15—Charles B. Graybill executed his bond.

1872, February 15—Charles B. Graybill resigned.

Plaintiffs claim that said Graybill was a defaulter, and bring suit on his bond against Miles and John Price.

1. Defendants claim that they are not responsible for any defalcation occuring previous to execution of bond.

In support of their view, defendants cite the following authorities: 5 Peters U. S. Sup. Ct. Reps., Farrar & Brown vs. U. S., page 573; 15 Peters U. S. Sup. Ct. Reps., U. S. vs. Boyd, *et al.*, page 206; 9 Cranch U. S. Sup. Ct. Reps., U. S. vs. Giles, page 339; 2 American Com. Law, Title Bond, (416) page 400; 1 Pet. C. C. Armstrong vs. U. S., page 46; 9 Wheaton U. S. Sup. Ct. Reps., Miller vs. Stewart, page 234.

2. Defendants claim that they are relieved from *all* liability for any defalcation from June 15th, 1871, to December, 1871, because of the gross laches and irregularities of the officers of said Association in the conduct of the business of the Association.

(1.) They hold that the irregularities consisted in not having monthly and quarterly examinations (or at least definite and peridoical settlements) of the Treasurer's accounts by the directors. Constitution and By-Laws, Art. V., Sec. 4; Arts. VII. and IX., Secs. 12 and 4.

(2.) In not having ascertained at an early date that said Graybill's books were irregularly and improperly kept, and thus protected the sureties, the whole corrective being in the hands of the directors, and not in the power of the defendants. 7 Johnson, N. Y., 332; 19 English Law Equity Reps., Watson vs. Alcock, 64.

3. Defendants claim that they are relieved from all liability

for any defalcation that may have occurred between December 3d, 1871, and February 12, 1872, (the former date being the time when the annual election of officers should have taken place in accordance with the by-laws and constitution of the Association, and the latter date being the time when Graybill resigned,) for the reason that Graybill's term of office had expired.

(1.) See general act for creating corporations, (1868) page 119, sec. 2, 6th division. Corporations cannot make by-laws inconsistent with the laws of the State, &c.

Sec. 4th, 5th division. Sec. 5—What officers, and time of elections. Sec. 8—Failure to comply shall cause failure &c.

Also see 2 Pickering, Mass., 234, 235, 236, and 237; 9 Cranch, Sup. Ct. Reps, U. S. vs. Giles; 2 American Com. Law, 416; By-laws and Constitution of M. L. & B. Asso.

4. In permitting Mr. Fox, with their knowledge and consent, to act as Treasurer in place of Graybill, which was not contemplated by the bond. (Fox acted for at least two weeks prior to Graybill's resignation.) 21 Howard, 75 and 76; 2 Pickering, Mass., 231 to 237, inclusive; 9 Wheaton, 234.

Irregularities also in not having periodical meetings as charged against second persons. Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertaking, and the case must be brought strictly within the terms of the guaranty. Hence any variance or irregularities on the part of the Association, from the clear meaning of the contract as understood by the obligors at the time of the execution of the bond, in the business of the Association, will relieve the securities. Howard's U. S. Sup. Ct., Vov. 21, p. 75. Miller vs. Stewart; 9 Wheaton, 234. Hat Factory vs. Messenger; 2 Pickering, 234.

5. Bond must be construed in view of act of incorporation, Constitution and By-Laws, &c. See act of incorporation, August 8, 1868, section as above. See sections and Articles

of Constitution and By-Laws; 2 Vernon, 518; 2 Pickering, 234 and 235; 21 Howard U. S. Reps., 76.

Fleming & Daniel for Appellee.

Suit commenced under the Code. Appeal from judgment entered on report of referee.

To the report of referee both plaintiff and defendants excepted.

Case brought to this court by defendants.

The plaintiff objects or excepts to the report of the referee in this that he finds the defendants not responsible for the default in the payment of $1,380.50 during the interval between the election of said Graybill as Treasurer of said Association and the signing of the bond by the sureties, that is from November 18, 1870, to January 15, 1871, on the ground that a proper construction of the bond would include that time and amount, and on the ground that the failure to pay over being admitted and the amount, the presumption is that the money was in hand at the time the bond was signed by the sureties; if so, then the principal was chargeable with it, and it is brought within the very terms of the condition of the bond.

There is nothing in the testimony to show that the money was not in hand on the 15th of June, 1871. Is it not the presumption that it was in hand, and should not that presumption have been rebutted by defendants?

Facts relied upon to discharge a surety must be distinctly proved to the satisfaction of the court. Walleshlare vs. Searls, 9 Wright, 45; 14 Wright, 37-50.

It has been held in Illinois that when a town officer at the expiration of his term of office made a report showing the amount of money in his hands belonging to the town and the report was approved by the town, he being re-elected and given a new bond with new sureties, held that

the latter were liable on his failure to account at the end of his second term for the money so reported at the end of his first term. Maley vs. The Town of Metamora, 78 Ill., 394, cited in 20 Am. Reps., 266; Pinkstaff vs. The People, 59 Ill., 148; Charles Pinkstaff, *et al.*, vs. People of the State of Ill., 59 Ill., 149.

The defendants in excepting to the referee's report claim—first, that the laches of the Association by their (its) officers operated as a release to them, the securities, &c.

The laches of obligee in a bond conditioned for the principal obligor to account for and pay over, from time to time, all such tolls as he should collect for the obligees in not properly examining his accounts for *eight* or *nine* years, and not calling upon the principal for payment so soon as they might have done for sums in arrears and unaccounted for, is not an estoppel at law in action against the sureties. 10 East, 34, cited in vol. 5, new ed., 274; Nares and Pepys vs. Bouls, 14 East, 509.

Mr. Justice Story, in speaking of contracts of sureties, said: "It is admitted that mere laches, unaccompanied with fraud, forms no discharge of a contract of the nature between private individuals. Such is the clear result of the authorities." United States vs. Kirkpatrick, 9 Wheaton, 736.

In the opinion delivered in this case he comments upon and overrules The People vs. Jansen, 7 Johnson, 332.

Mere forbearence by the creditor to the principal, however prejudicial to the surety, will not discharge the surety. The same rule applies to officers of corporations. The Pittsburg and Chicago Railway Co. vs. Shaffer, 59 Pa., 350.

To the second exception of defendants, that the sureties were released because the annual election for Treasurer was not held, &c., we say that by the constitution and by-laws of the said Association, Art. V., Sec. 1, page 10, which

reads as follows: "The President and Board of Directors must be elected immediately after the adoption of these articles, and on the second Monday of December annually thereafter, and they, together with all other officers of said Association, shall hold office until their successors are elected and qualified."

The Treasurer, Solicitor, and Secretary shall be elected by the Board of Directors annually. Ibid., Art. 5, Sec. 2, page 11.

When the law provides that one officer shall hold until his successor is qualified, the liability of the sureties continues until that is done. Thompson vs. The State, 37 Miss., 518; Moore vs. Boudinot, 64 N. C., 190.

The Treasurer holds office until his successor is qualified. This is the law of the Association.

By the word of the bond the sureties covenant to be responsible for his acts so long as he continues in office.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action under the code brought by the Mutual Loan and Building Association against the sureties, Miles Price and John Price, upon the bond of C. B. Graybill, Treasurer of the Association. The bond, after reciting the election, is conditioned "that if the said Charles B. Graybill, his executors or administrators, shall honestly and in good faith serve as such treasurer during his continuance in said office, and hold and dispose of whatever he may receive as such treasurer as the Association or its Board of Directors may direct, and according to the provisions of the constitution, by-laws and regulations of said Association now existing, or which may be by them adopted, and at the expiration of his said office shall pay and deliver over to his successor in office, or any other person duly authorized to receive the same (by the authority of said Association,)

all such monies, property and other things, which shall appear to be in his hands, due by him to the said Association. then this obligation to be void, otherwise to remain in full force." The bond is dated the 15th day of June, A. D. 1871. The complaint sets up this appointment, the execution of the bond, the resignation of Graybill on the 12th of February, 1872; that he was then indebted to the plaintiffs in the sum of $2,537.30, and claims damages for $3,000 and costs. It is unnecessary to state in detail the defence made in the answer, or to more fully state the pleadings. They have been treated by the parties as raising generally the question of the liability of the sureties for all and every part of the alleged indebtedness.

Upon a reference, the whole amount of the defalcation was ascertained to be the sum of $2,346.22, and as there was some question as to the date at which this deficit occurred, it was agreed by the parties that the deficit from November 18th, 1870, to June 15th, 1871, was $1,380.00; that the deficit from June 15th, 1871, to December 3d, 1871, was $505.71; and that the deficit from December 3d, 1871, to February 12, 1872, was $450.06. After evidence and hearing before referee, he found that the defendants were not liable for the deficit which occurred before the bond was executed, and that they were liable for the deficit which occurred after it was executed, embracing the deficits from June 15, 1871, to February 12, 1872, and so adjudged. To the report of the referee each party excepted; the plaintiff to so much thereof as executed the sureties for the deficit occurring anterior to the giving of the bond, and the defendants to so much therof as charged them with the subsequent deficits.

The plaintiff's ground of exception was that the referee "ought to have found and reported" that the defendants were responsible for the amount of the admitted default anterior to the date of the bond.

The defendants' ground of exceptions for the charge for the defalcation between June and December, 1871, was because they were "released as sureties on said Graybill's bond by the acts, laches and gross irregularities of said Association, represented by their President and Board of Directors;" and their exception to the charge for the defalcation between December, 1871, and February 12, 1872, was on the ground that they "were released by the fact that the annual election for treasurer was not held as required and provided for by the constitution and by-laws of said Association, and by the act of incorporation, and because of the laches and gross irregularities of said Association."

The exceptions were overruled, the report confirmed and judgment entered thereon. From this judgment this appeal is taken by the defendants, and the errors assigned involve the question whether the action of the referee and of the court in giving judgment for the amount of the defalcation during the two last periods stated was correct.

The plaintiff having taken no appeal, and the action of the court as to the first deficit not having been excepted to by either party, it is not here for review.

The defence of laches here is set up as to all the defalcations of the treasurer for which judgment was given. The officers of the corporation failed to have monthly or quarterly examinations of the treasurer's accounts, as required by their rules and by-laws. Does this relieve the sureties of their liability under this bond? The constitution and by-laws of the Association are mentioned as prescribing the rule and method of their officers accounting. That is the effect of the language used in the bond. Under its terms this examination is made no condition of the liability of the surety, and the neglect of the officers in this respect does not, *under the bond,* relieve the sureties. Does this failure to examine the accounts relieve the sureties under the *general principles of law* applicable to such contracts? In the case

of the United States vs. Kirkpatrick, (9 Wheaton, 721,) the sureties upon an official bond of a collector of internal taxes contended that the laches of the government in delaying to call the collector to account at the periods prescribed by law relieved them of liability. While the court held that laches was not attributable to the government, still Mr. Justice Story, in delivering the opinion in the case, expressed very plainly his views as to the liability of the sureties upon a bond of this nature between individuals. He says it is the clear result of the authorities that laches of this character, unaccompanied with fraud, forms no discharge of a contract of this nature between private individuals. Here it is not alleged that there was any fraud. Such laches does not relieve the sureties. 10 East, 34; 14 East, 509; 59 Penn. State, 350. The case cited by appellant from 7 John., 332, maintaining a contrary view, has been overruled. 4 Wend., 574.

The sureties further claim that they are relieved from all liability for any defalcation that may have occurred after December 3, 1871, for the reason that his term of office had then expired, and with its expiration their liability ceased.

The limit of the liability of the surety is the term of office of the principal. This doctrine, as a general rule, we do not understand to be denied by the appellee. Its position is, that under the broad language of this particular bond, and the provisions of the constitution and by-laws of the Association, which are the law of its being when not in conflict with the laws of the State the sureties are bound during the continuance of the treasurer in office; and that as under the law of his office he was to hold until his successor was elected and qualified, his sureties are responsible for all defalcations which may occur anterior to the election and qualification of his successor.

The general statute, under which this corporation is formed, has no provision regulating the terms of office of

officers. Under the statute this power is in the corporation itself. Hence the law of the office here is the constitution and by-laws of the company. These by-laws provide that the treasurer shall be elected by the board of directors annually, and that all the officers of the Association shall hold office until their successors are elected and qualified. The by-laws further require annual meetings on the second Monday of December, at which the president and directors are required to be elected, and in case of a vacancy in any office, the board of directors are empowered to fill it. The office of treasurer is therefore an annual office, extending in its regular terms from one annual meeting to another, and in case of a vacancy occurring between annual meetings, the board of directors "fill the vacancy." In this case the treasurer was appointed on the 15th of June, 1871, by the directors, and according to the by-laws his regular term of office expired on the second Monday in December thereafter.

The question here is, is not this the limit of their liability? Stating the whole question accurately, it is whether a bond given for the faithful performance of an officer's duties during his continuance in office, in a case where the regular term is for one year, the officer to hold until his successor is qualified, is not limited to the time fixed by law for the expiration of the office rather than the time which he may continue in it. This is a question of no little importance. We have examined it carefully and accurately, and without entering into any introductory discussion of the general character of the contract of suretyship, we will give the cases covering the subject and dispose of this case as the principles announced require. The case of the Chelmsford Co. vs. Demarest, (7 Gray, 2.) In this case Demarest was surety on a bond of Phelps, treasurer of the company, the condition of which was that "whereas, said Phelps has heretofore been chosen treasurer of said company: now, therefore, if said Phelps,

during his continuance in said office shall faithfully and punctually perform all the various duties incumbent on him, in his said capacity, and shall account from time to time for all moneys and funds of said company that may come to his hands as treasurer, and if, on ceasing to hold said office he shall deliver over to the directors of said company, or to his successor, all books, records and papers belonging to said office in his possession or custody, and all moneys, notes, securities or funds that may then be in his hands or control, then the foregoing obligation shall be void, otherwise of full force." The statute regulating the term of officers of the company, provided that the treasurer, like all other officers, should be chosen annually, and adds, "and shall hold their offices until others are chosen and qualified in their stead." Demarest,as surety, was sued for defalcations occurring after the expiration of the year. The defence was that his liability was restricted to the "official year only." Mr. Chief Justice Shaw, speaking for the court, says: "The court are of opinion that under the direction of this law Phelps was elected as treasurer to an annual office; that the bond was a collateral security for the faithful performance of the duties of that office, and that such office being annual, such duties are limited to the term of a year; but in fixing it to one year we do not understand the statute to mean an exact calendar year or the number of days constituting an astronomical year. It is to be expounded according to the subject-matter. and therefore it must be construed to be for the official year of such corporation or body politic as holds annual meetings, the official year being the term ordinarily from one annual meeting to another. Nor do we think that the further provision above cited—'shall hold their offices until others are chosen and qualified'—substantially changes the character of the office from an annual one to one for an indefinite time. What then is the legal effect of the added clause, 'until others are chosen and qualified?'

To give it the construction contended for by plaintiffs would annul the previous clause making it annual; but both are embraced in the same sentence. They are equally imperative and obligatory, and if possible both must have their natural effect. Looking again at the subject-matter, and supposing the Legislature to have had in view the actual condition of manufacturing corporations, and their practical working as bodies politic, organized by law, it seems to us that the law regarded these as annual offices; but regarding the inconvenience which would arise if one were to terminate before the other commenced, one was made to continue and terminate at the same precise point of time at which the other commenced, and thus avoid any interval. But some time must elapse after the re-election to enable the officer elect to express his acceptance, and some further time, if giving bond is an necessary qualification, to enable him to procure the execution of the bond. The law having directed that such officer shall be chosen annually, or at the annual meeting, it assumes and pre-supposes that such direction will be complied with, and then the words in question must be construed to mean till the next annual meeting, or meeting at which such annual election is to be made, and such reasonable time afterwards as shall be sufficient to enable the officer elect to procure and deliver his bond and do whatever else is required to complete his qualification; or, if he fails thus to qualify, until the corporation can elect another and cause him to be qualified. In this way both parts of the provision of the statute will have their legal and proper effect. But if the corporation fail to comply with their legal duty of electing a treasurer annually, or if they fail to comply with a provision of law made for their benefit, and do not require him to give bond within a reasonable time after he has signified his acceptance of the election, and if they permit him to go on and act in the office during the whole year, and for succeeding years, without giv-

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ing bond, whatever other effect such a course may have on the rights and liabilities of the corporation, it cannot enlarge or vary the obligation of those who have become responsible for the conduct of such officer in performing the duties of an annual office." The case of Dover vs. Tumbly (42 N. H., 69,) was a suit against a surety upon the bond of an annual officer, holding until qualification of his successor. The court sanctioned the view of the Supreme Court of Massachusetts, and disposed of the case accordingly. The courts have held the same doctrine in Delaware. 2 Harr., 195. This, too, is the doctrine of the English cases. 6 East, 507; 2 Bing., 32; 2 B. & A., 431; 2 Saund., 411; 2 N. R., 175.

The bond in this case having been given in June, 1871, the sureties recognized the official existence of the treasurer. 1 Vroom, 73; 3 Dutch, 407; 17 How., 442, and under the by-laws, his term extended to the second Monday in December, and for such further time as is reasonably sufficient for the election and qualification of his successor. The judgment of the court was erroneous in finding the sureties liable beyond this time, and for this reason must be reversed.

The judgment is reversed, and the case is remanded for further proceedings, conformable to law, and not inconsistent with this opinion.

TATE'S ADMINISTRATOR, PLAINTIFF AND APPELLANT, VS. JONES' EXECUTOR, DEFENDANT AND APPELLANT.

In pursuance of a parol agreement for the sale and conveyance of lands, the purchaser paid the price agreed on in full; the purchaser was a tenant at will, in possession at the time of making the agreement, and afterwards remained in possession, erected a dwelling house and fences, enlarged the enclosures, cultivated the land, set out fruit trees

and pruned the trees already grown, and treated the property as his own, enjoying it as the home of his family, receiving the crops and the proceeds of the fruit for years, with the knowledge and without objection by the seller or his heirs or representatives: *Held*, upon bill filed for a specific execution of the agreement,

1. That upon a parol agreement for the sale of lands, the payment of the purchase price alone is not sufficient to take the case out of the statute of fraud.

2. That the payment of the purchase money, followed by delivery of possession, under a parole agreement for a sale of lands, or followed by a continued possession by the purchaser, (if already in possession,) and circumstances showing that the subsequent possession was inconsistent with the original tenancy, and was consistent only with, and legitimately referable to the agreement for a purchase and sale, constitute such part performance that the seller is estopped from insisting that the agreement was not signed, and a specific execution of the agreement may be decreed.

3. There is no rule that the improvement made by a purchaser under a parol agreement for the purchase of lands shall be of any specified value, in order to warrant the inference that they were made with reference to the contract. It is enough that they are of such a character, and made under such circumstances, that it will be inferred that they were made because of the agreement to convey.

Appeal from the Circuit Court for Jackson county.

This case was commenced in the Circuit Court for Calhoun county, prior to the adoption of the Code, and transferred, by consent, to Jackson county. Jeremiah Tate died pending the suit, and it was revived by his administrator, Seaborn Tate. The final decree was rendered subsequent to the adoption of the Code.

The other facts of the case are stated in the opinion of the court.

C. C. Yonge and *J. F. McClellan* for Appellant.

The complainant seeks a decree for specific performance of a parol contract for sale of a tract of land situated in Calhoun, which he alleges was made with R. S. Jones in his life time.

1st. The defendant denies, on information and belief, that any contract was made for the sale of the particular land sought to be specifically conveyed, alleging that the contract related to another and different tract of land.

2d. The defendant pleads the statute of frauds, claiming that if such contract was made that it was and is void because not reduced to writing as required by the 4th section of the statute of frauds, and also of the 1st section of act of Legislature of Florida, approved 15th of November, 1828. See Thompson, p. 217.

The complainant, admitting that the statute has not been complied with, seeks to bring the case within some exception to the said statute, and insists that though the contract was not in writing, that such part-performance has been made as will authorize the court to disregard the statute.

He claims—First, that the purchase-money was paid; second, that the purchaser entered into possession; third, that the purchaser had made valuable improvements on the land; fourth, that the contract was prevented from being reduced to writing by the fraud of the defendant.

A careful examination of the testimony and the law, as settled by the numerous adjudications, both English and American, will, we think, satisfy the court that neither of the positions occupied by the complainant, or all of them together, are sufficient to authorize the court to disregard the positive requirement of the statute, that contracts for the sale of land, or some note or memorandum thereof, should be in writing. The Florida statute, though not a literal copy of the statute of Charles, is, as far as the questions involved in this case are concerned, substantially the same. The language is: "No action shall be brought on any contract for the sale of lands, tenements, or hereditaments, or of any interest of or concerning the same, or for any lease thereof, for a longer term than one year, unless the agreement or promise, upon which such action shall be brought,

or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto lawfully authorized." Thompson, 217-18.

The cases in which the courts have dispensed with the requirements of the statute are where the refusal by the court to decree a specific performance would work a fraud upon the party seeking it. Brewer vs. Brewer & Logan, 19 Ala., 481.

Lord Reddesdale's rule is: "That to authorize a disregard of the statute, there must be such part-performance as will put the party seeking the specific performance into such a position as will operate as a fraud upon him, unless the agreement be performed." Frame vs. Dawson, 14 Ves., 387.

An example of this is where on a parol agreement a man is admitted into possession he is made a trespasser, unless his possession be referred to the agreement. Gregory vs. Mighill, 18 Ves., 333.

The doctrine is expressed by Hovenden, vol. 2d, p. 448, in this language: "When the agreement has been so far performed by one party, with the tacit encouragement of the other, and relying on his fulfilment of it, that for the latter to repudiate it and shelter himself under the provisions of the statute, would amount to a fraud upon the other, that fraud will be defeated by compelling him to carry out his agreement."

The ground on which the courts justify themselves in disregarding the statute, is the defeat of a positive fraud, and not to punish a breach of faith.

Browne on Frauds, p. 488, says the cases that have been relieved against "presented the feature of actual fraud, an artifice, a trick."

The plaintiff must show that his position is such that an action at law will not afford him adequate relief. Ib., 452.

See Frame vs. Dawson, 14 Ves., 386; Pembroke vs. Tharpe, 3 Swant., 437; Bookhurt vs. VonConottond, 1 John. Cas., 273; Armstrong vs. Kettlehorn, 11 Ohio, 265.

The courts do not profess to execute a parol contract merely because it is satisfactory proved. Beckmaster vs. Norris, 7 Ves., 341.

In the case of Frame vs. Dawson, the bill alleged that the complainant finding a party-wall required repairs, applied to his landlord for contribution, who made a verbal promise to extend the lease for ten years. On the faith of that promise, complainant expended £460 on the wall, the annual rent being only £35. The answer admitted the request for contribution, but denied any positive promise, and relied on the statute of frauds. The court said: "No matter how clearly the agreement be proved, the complainant is not entitled to a decree. He must show part-performance by acts unequivocally referable to the contract, such as the party would suffer an injury amounting to a fraud by refusal to execute the contract." Ib., 386.

The principle is, that the act must be such that, if stated, it would itself infer the existence of some agreement, and then the agreement may be proved. Ib., 587.

"The act must be unequivocal." Wills vs. Stradling, 3 Ves., 387.

Example in which a court of equity will disregard the requirement of the statute: where there was an agreement for a deed and for a defeasance, and after execution of deed the party refused to execute the defeasance, the court compelled the execution of the defeasance. Roberts on Frauds, p. 130.

"There is no foundation for the doctrine of part-performance, without the ingredient of actual fraud." Ib., 132.

Another example is where the remainderman encourages a party to take a long lease and make valuable improve-

ments, and the tenant for life dies before the expiration of the lease. Ib., 133.

"When a party neglects to avail himself of the protection of the law, choosing to rely on the honor of the party, he has little reason to complain." Roberts on Frauds, 133.

The courts have gone too far in permitting part-performance and other circumstances to take cases out of the statute. "Part-performance," Lord Avanley aptly says, "may be evidence of some agreement, but what agreement?" He says the courts ought to have required repayment. Ib. See cases of Holis vs. Whiting, 1 Vern., 151, and Dean vs. Bond, where large sums of money were expended on the faith of verbal contracts of lease, bills were sustained so far as to require repayment of the money. N. 66, p. 135, ib.

The courts do not execute the contract for the sake of the contract, but to disconcert the fraud. P. 135.

The court should reject all evidence of a verbal contract for sale of land, if being taken as true, it does not constitute an exception to the statute. (Poorman vs. Kilgore, 26 Pa., 365.) The doctrine of part-performance as ground of enforcing contracts has been repudiated in several States—we think in North Carolina, Mississippi, Tennessee, and perhaps others. See Ellis vs. Ellis, 1 Dev. Eq., 341; Beamen vs. Buck, 9 S. and M., 210; Redley vs. McNairy, 2 Humphreys, 174; Jacobs vs. Peterborough & Sherley R. R. Co., 8 Cush., 224.

The above citations of authorities are sufficient to show how careful the courts are in admitting exceptions to the statute of frauds, regretting, as most of the judges seem to do, that any exceptions at all have been permitted.

I. As to the effect of payment of purchase-money. See Bell vs. Andrews, 4 Dal., 152.

Payment of purchase-money alone is not sufficient part-

performance to take cases out of the statute of frauds. Cole vs. Watts, 2 Stock., 67.

Money paid on verbal contract for sale of land may be recovered back. Allen vs. Booker, 2 Stewart, 21; Keath vs. Patten, ib. 38.

Payment of purchase-money is not part-performance, for it may be recovered back with interest. 2 Hovenden, p. 3.

"Payment of the money is not part-performance—it may be repaid and party restored to his former situation." 14 Ves., 388.

II. As to the character of improvements that will operate to suspend the operation of the statute.

They must be of such character "as to appear to have been made in pursuance of the contract." (Browne, 454.) They must be such as appear to the court would not have been made except on account of the agreement. Lacon vs. Mertin, 3 Atk., 34; Frame vs. Dawson, 14 Ves., 586.

The improvements must be with the knowledge of the other party, and when he, with such knowledge, remains silent, it imports a fraud. See Roberts, 130.

"Improvements to be of weight, in case of a continuing possession, must be decidedly inconsistent with the old relation." Spalding vs. Conzleman, 30 Mo., 177, 1st p., 209.

III. As to effect of possession by the purchaser.

"The possession of vendee is not sufficient when not shown to be under the contract of sale." Danforth vs. Loney, 28 Ala., 274.

When the possession is alleged in the answer not to be under the contract of sale, the burden is on the complainant to show that it was. Ib., 274.

"With respect to a tenant already in, remaining in possession, amounts to nothing." 2 Hovenden, p. 3.

"The possession must be connected with the contract of

sale, and in part-performance of it, and be intended to be in pursuance of it." McNeil vs. Jones, 22 Ark., 277; Danforth vs. Lacey, 23 Ala., 274; Charpiot vs. Sigerson, 25 Mo., 63; Cole vs. Potts, 2 Stock., 67; Knoll vs. Harvey, 19 Wis., 99.

"Continuance in possession cannot be deemed part-performance. The possession must unequivocally refer to and result from the agreement." McHanna vs. Blunt, 20 Iowa, 142; Resenthal vs. Freeburger, 25 Md., 75.

"Possession that has been abandoned will not authorize decree." Chambless vs. Smith, 30 Ala., 366.

"A greater latitude will be allowed to the defendant in resisting than to the complainant in making out his case." Casey vs. Holmes, 10 Ala., 776.

IV. As to character of proof required:

"It must be competent, satisfactory, definite and certain." Lodell vs. Lodell, 36 N. Y., 327; Sims vs. McEwin, 27 Ala., 184; Carver vs. Losseter, 36 Ill., 182.

"The contract must be distinctly and clearly understood." Sage vs. McGuin, 4 Watts and Seg., 228.

"He who would recover land on evidence of a parol contract will be held to full, complete, satisfactory, and indubitable proof of what the contract was, and what land was purchased, the consideration that was paid for it, and that possession was delivered in pursuance of the contract." Woods vs. Farmore, 10 Watts, 195.

"The contract must be established by competent proof, and be clear, definite and unequivocal." Charnley vs. Honsberg, 13 Pa., 16; Prentiss vs. Mitchell, 17 Ga., 588; Wilson vs. Wilson, 6 Mich., 9; Aday vs. Eckols, 18 Ala., 353.

If the contract is impeached by competent proof, it must be sustained by rebutting proof or the bill will be dismissed. Meid vs. Randolph, 8 Texas, 191.

The general facts relied on as showing part-performance

must be specifically set forth in the bill, and evidence not applicable to the special allegation will not be heard. Bonier vs. Caldwell, 8 Mich., 463.

These authorities seem to establish the following propositions:

1. That the courts are reluctant to allow exceptions to the statute, and refuse to extend the doctrine beyond the original precedents.

2. That payment of the purchase-money is not such part-performance as will take a case out of the statute, because the money may be paid back or recovered in an action at law.

3. That a continuing possession is not part-performance, and in the language of one of the cases cited, "amounts to nothing."

4. Possession that has been abandoned amounts to nothing.

5. That there is a well recognized distinction between a mere breach of faith in completing a parol contract for sale of land, and such fraudulent conduct as will dispense with the requirements of the statute, every refusal to complete a verbal contract involving, as it does, a breach of faith.

6. Nothing is part-performanee which does not put the party seeking specific performance into a situation which is a fraud upon him, unless the agreement be performed.

7. The proof of the contract itself must be complete, satisfactory, clear, definite and certain.

8. That a stronger case is required on the part of the complainant to entitle him to a deeree than on the part of the defendant to resist a decree.

Remarks on the Evidence.

An examination of the numerous depositions will show great conflict between the witnesses. The complainant's witnesses are not only contradicted on most points by the

witnesses of defendant, but are not consistent with each other.

Mrs. Shaw, for complainant, says she was present at the trade, and that the purchase-money was paid at the time; could not locate the grove which was sold.

Register, for complainant, says Mrs. Shaw was present on the day of the trade, but does not think she was present at the time of the trade; and says the money was not paid on the day of the trade, but at a subsequent time.

Redd says she was not there; Whitfield says she was not there. The explanation probably is that she was alluding to the trade for the other grove, about which there is no controversy.

Samuel Davis, for complainant, proves that Tate's possession antedated the alleged purchase.

Defendant objects to so much of the witnesses's testimony as states the declarations of Tate. Witnesses's answer to the eleventh interrogatory, taken in connection with his other answers, shows that his information was, to a great extent, obtained from conversations with Tate. He says Tate commenced improving the place as soon as he bought it, and yet it is evident he did not know when he bought it, for he went to buy it himself for a Mr. Bryant, and found it already sold. He gives it as his opinion that the improvements made by Tate were valuable, which is not admissible. It is for the court to determine whether they were valuable. Says he set some orange trees, but don't know how many, and pruned others; bought 500 feet of lumber, whether before or after the alleged purchase does not appear; built a common log-house, which Mary Lee, in answer to the sixth cross-interrogatory, says was a smoke-house; made some cow-pens enclosing about five acres. His object in asking permission to occupy the place was to use it as a stock place for his cattle, and these improvements were necessary for these purposes. The cost of them is not given, and if the court

will act on its own information as to the cost of such improvements, we are sure they will not say they were beyond the value of the privilege of occupying the place rent free. All this is certainly consistent with his tenancy. He had agreed to take care of the place, (see Mary Lee's deposition,) and as the orange trees give it its value, he could do no less than give the grove such attention in the way of re-setting the trees, when they were too thick, and pruning such as required it.

Says he thinks Tate planted 50 trees. What he thinks about it is not testimony, and is contradicted by the other witnesses.

Mary Lee's deposition seems to be generally based upon information derived from Tate, and is objected to on this ground. She says Tate made cow-pens; enclosed five or six acres. She thinks he set out 75 trees, and manured them; the charge was a dollar a tree to manure them, and that it would take three hands a week to set them out; that she helped to set them out, and that they grew on the place.

The extravagance of this statement as to cost of manuring trees and labor required in setting them, is enough, without contradiction, but she is contradicted by complainant's witness. Seaborn Tate, who says in answer to sixth cross-interrogatory that he set out the trees, and that two days was time enough to do it in.

Seaborn Tate's testimony, though for the complainant, is most valuable for the defendant. He occupied a position, being a member of complainant's family, to speak of his own knowledge, and his bias, if any, would naturally be for, and not against the complainant.

It is true, that he says the improvements made by complainant were valuable, but his opinion is not evidence, and the details he gives of what constituted the improvements (and which are not proved to have been made after the alleged purchase,) show that they were entirely consist-

ent with his tenancy. They consisted in clearing up the grove, making some fences and planting some trees.

He says, in answer to the cross-interrogatories, that Jones, the defendant, put Tate in possession of the place "to take care of it." That there were seventy-five trees in the grove, and about a dozen more were taken from the grove on the place and planted, that is, they were simply re-set; that it would take one hand two days to plant them, which, at a charge of one dollar per day, would be two dollars as the cost of the planting; he also says he was the person who planted them. The other witnesses show that some cow-pens were made for his stock, and a small patch enclosed, we may suppose for potatoes and greens, such as you find at every piney woods place. In "taking care of the place," which constituted the only consideration for its occupancy, he could not do less than the small amount of work testified to on the orange grove in clearing it up and re-setting a few trees. The other improvements were for his own convenience, and were of small value. The defendant's witnesses, however, prove that these enclosures were already on the place when complainant went there. Whitfield testifies as to the sale of another grove and knows nothing about the sale of the grove in controversy. He states that Tate occupied the grove in controversy as the tenant of defendant, to take care of the place, and that the improvements made by him were of very little value, not more than the value of the rent. That there were about 50 or 60 trees in the grove when Tate took charge of the place, and that he re-set about one dozen more; that one man could do it in a day, and was worth about seventy-five cents. This corroborates and sustains Seaborn Tate's testimony.

Mr. Redd also proves that Tate occupied the grove as tenant of Jones, and states that no improvements of value

were made by him, and the few trees that were re-set were taken from the grove on the place.

Sarah Yon shows acts of ownership by Jones over the grove after the alleged sale, refusing to sell it, stating it would be a resource for his family after his death.

Rolly Richard's testimony is objected to so far as it is hearsay, and amounts to but little.

Rhames and Redd both testify to the abandonment of the grove west of Chipola, by Tate, the alleged purchaser of it. Rhames says Tate injured the grove by trimming it too high.

Page testifies that the grove was in a better state of improvement and condition when Tate went into possession, than in 1866. That there was on the place a dwelling house, smoke house, corn crib and horse lot, six or seven acres enclosed and in cultivation, and only two or three more orange trees than when Tate went there.

Whitfield, on re-examination,states about the same thing. Willis says Tate built no house on the place; that the place was in a bad condition when Tate went there, and not much better when he left.

Hawkins says the place was in bad condition in 1866, compared to its condition when Tate went there.

We think these depositions establish the following propositions:

1. That the improvements made by complainants are not of such a valuable character as will be held to be part-performance of a verbal contract for sale of land and will not dispense with the requirements of the statute, and that they were consistent with the terms and object of his tenancy, and were not necessarily referable to his alleged purchase.

2. That there is no evidence that the defendant Jones encouraged the small improvements that were made by complainant, or that he was even cognizant that they were being

made, and that there is an entire absence of proof of any fraudulent acts or devices by the defendant.

3. That the possession of Tate was a continuing possession, he having acquired it, before the alleged contract of purchase, to use as a place for keeping and penning his stock of cattle, and with the understanding that he was to take care of the place, paying no rent.

4. That after the alleged contract of purchase he abandoned the possession of the place.

5. That both parties could write, and that the proposition that the alleged contract was prevented from being reduced to writing by the fraud of the defendant is entirely unsupported by proof.

In Purcel vs. Minor, (4 Wal., 513,) the Supreme Court says: It is necessary in order to enforce a parol contract for the sale of land—

1. That the proof should be "full, satisfactory and indubitable."

2. That there must be left no *jus deliberandi* or *locus paenitentiae*.

3. That it must not be made out by hearsay or declaration of a party to strangers.

4. That payment of the purchase-money is not sufficient if the party have a remedy at law to recover it back.

5. That there must be such part-performance that its recission would be a fraud on the other party, and could not be fully compensated in damages in a court of law.

6. That the delivery of possession has been made in pursuance of the contract and acquiesced in by the other party, which is not the case where the proof shows a scrambling and litigious possession.

Here the possession was not continuously in the complainant, but was first in defendant, then in complainant as lessee, then for some time in the defendant, then in a receiver, and was scrambling and litigious.

1. In this case the proof is not full, satisfactory and indubitable, but is uncertain, vague and conflicting.

2. The *jus deliberandi* or *locus paenitentiae* survived the payment of the purchase-money because it could be repaid or recovered back, as both parties are presumed to have known when it was paid, if it was paid.

3. The proof offered by the complainant is nearly all of the description condemned by the Supreme Court, such as hearsay and declarations to third persons.

4. That the complainant undoubtedly had the right and ability to recover the purchase-money, if paid, by action at law.

5. There is no part-performance that could not be compensated in damages in a court of law, whether it be the recovery of the purchase-money or the value of the improvements. But we insist that there were no improvements that were necessarily referable to the alleged purchase, and that such as were made were not inconsistent with the complainant's tenancy. The truth is, that at the time of this transaction, orange groves had not become of the value they now are, and were not regarded so either by the complainant or the defendant, and the accidental increase in value of the improvements cannot change the rights of the parties.

We conclude with the suggestion that the wisdom of the statute of frauds and perjuries, in its purpose to remove temptation to perjury, by refusing to permit contracts for the sale of land to be established by oral testimony, finds no fitter illustration than in this case. Some fifteen or twenty witnesses have been examined, and the conflict between them is from the beginning to the end. A rigid adherence to the requirements of the statute, by excluding these depositions and simply requiring the contract to be in writing, as the statute provides, would have saved all this conflict, and have been the wiser course. And as is said by Roberts, on page 133, "when a party neglects to avail himself of the

protection of the law, choosing to rely on the honor of the party, he seems to have little right to complain."

We think the Supreme Court of Florida has not before been called upon to determine the questions involved in this case, and it is free to follow the example that has been set by several States in adhering to the requirements of the statute. It is the province of the Legislature to determine what shall be the law of a State, and the duty of the courts to expound the law as written, and not to find plausible excuses for setting aside and disregarding the will of the Legislature. The law is, that no action shall be maintained on such a contract as it is alleged was made between the complainant and the defendant in this case, and the courts will have discharged their whole duty when they yield obedience to this requirement of the statute; and should the court, in its wisdom, adopt this course, it will hereafter be saved the regrets in which we so often find other courts indulging, by permitting any exception to the full operation of the statute.

George S. Hawkins for Appellee.

I contend that the contract of sale, as alleged in the bill, has been fully performed; and a court of equity will enforce a parol agreement when there has been part-performance. 2 Story Eq. Ju., 759-761.

The price of the land was paid by Tate, possession taken and retained till a wrongful and covenous entry by the defendants in the court below. Extensive and valuable improvements were made by Tate, and the land purchased has been duly identified as the property sold by Jones to Tate.

Payment of the Consideration Money.—Although payment alone is not sufficient to satisfy the statute of frauds, yet it may corroborate other acts which are regarded as part-performance so as to afford ground for a decree of spe-

cific execution. If accompanied by the act of entering into possession in pursuance of a verbal contract of sale, a case of part-performance is established. Browne on the Statute of Frauds, 465, and authorities cited.

For proof of sale and payment of purchase-money, see answer of Mary Jones, Adaline Shaw, Duncan Shaw, Samuel Davis, John Jones, Mary Lee, R. J. Taylor, and James Register.

Possession.—The evidence shows that Tate was in possession of the grove a short time before the sale; that he was placed in that possession by R. Lawson Whitfield with leave to stay there till he (Tate) could build a house, and he was to take care of the place.

A temporary possession was given to Tate. No lease is shown, nothing beyond a mere license, revokable at any moment, and which expired with the death of Jones in December, 1863, the sale having been on the 10th June, 1863. *Vide* Hilliard on Vend., p. 125, 129, 132; Browne on Frauds. See Whitfield's testimony.

Admitting a temporary possession, yet we say it was continued after the sale, and such acts were performed by Tate as to show that this possession was held and continued by him, not under the license, or at most a tenancy at will, but in pursuance of and solely referable to the contract of sale. In cases like the present, the great and vital question is the *quo animo,* the possession was taken and held by Tate. Browne on Statute Frauds, 476, 478, 479; Wills vs. Stradling, 3 Vesey, 378; 1 Sug., V. & P., 163.

A continuous possession is enough, if in pursuance and execution of the contract. 2 Parsons on Con., 550, 551, 552, 553, and authorities citied, especially Mundy vs. Joliff, 3 My. & Cr., 177; Adams Eq., (86) top p., 230; Hilliard on V., 148; 1 White & T. L. C. Eq., 726, 3d ed., citing and commenting on Lester vs. Foxcraft, a leading case; possession is sufficient where the assent of the vendor

is shown or inferrible. Smith vs. Underdonk, 1 Sand., 379; Hart vs. Hart, 3 Des., 592; Anderson vs. Chick, 1 Bailey, 118.

Possession alone, in pursuance of a contract, without any pretence of improvements, is sufficient. Parsons' Selected Cases in Eq., 427-429; Browne on Statute Frauds, §466-467.

Possession was retained by Tate under the contract of sale for several years, and until defendant, R. L. Whitfield, covertly and tortiously deprived him of it.

As to continued possession, I cite further: Browne on Statute Frauds, §484-485; Wilde vs. Fox, 1 Rand., 165; Thompson vs. Scott, 1 McCord, ch. 32; 1 Hilliard on V., 148, citing, in note 4 Drury vs. Conner, 6 Harris & John., 288; Sugden on V. (141) 163, citing with approbation Wills vs. Stradling, 3 Ves., 378.

Where tenant, continuing in possession, makes improvements upon the premises, it is of great weight to show a change in the holding. Browne Statute Frauds, §480, citing Savage vs. Carrole, 1 B. & B., 119; Sutherland vs. Briggs, 1 Hare, ch. R., 27-31; Donald vs. Drew, 1 Young & Col., 345, (356.) In the first case, Morphet vs. Jones, 1 Swanston, (a leading case) was quoted by Sir James Wigram, V. C., who, in deciding the cause, materially qualified the strict doctrine in that case as to continuing possession and part-performance, and he adopted the decision of Mundy vs. Joliff, 3 Mylyne & Cr., already cited. In the latter case, (1 Y. & C.) the case of Morphet vs. Jones was cited to show that a purchase and continued possession by a tenant did not constitute part-performance. But Sir J. L. Knight Bruce, who decided the cause, also qualified the old arbitrary rule as to the continued possession by the tenant. Both of these cases are *quatuor pedibus* with the case at bar. In the case of Mundy vs. Joliff, cited in 2 Parsons on Con., 554, Lord Cottenham, Lord High Chancellor, held

that even where the agreement was not made out with perfect precision, yet if the plaintiff had laid out money, or otherwise makes out a case of part-performance, the court will endeavor, with especial earnestness, to collect, if it can, what the terms of the agreement were. Browne on Statute Frauds, §§481, 484, 486, 487.

1 Story Eq. Ju., 11th ed., §763, a., citing a very recent decision upon this interesting question.

Improvements.—Extensive and valuable improvements were made by Tate upon the land in controversy, and money expended. 1 White & T. L. C. in Eq., (3d Am. ed.) 732-733, and authorities cited; Browne on Statute Frauds, §488-487. In Malinis vs. Brown, 4 Comstock, N. Y., 403, cited in Kent Com., the court held that the mere payment of money was enough to take the case out of the statute, if the repayment of the money would not restore the plaintiff to his former position.

Locality and Description of the Property Sold.—The evidence clearly shows that the orange grove west of the Chipola river, and described as the south half of lot 5, section 30, township 4, range 9, in the county of Calhoun, was the one sold by Jones to Tate. The very fact of the continuing possession of Tate, which has been so zealously attempted to be ousted to our disadvantage, carries with it an inherent evidence that the above-described property embraced the orange grove west of the river and the one purchased by Tate from Jones. All the circumstances are to be taken together, and moral probabilities; moral evidence are sufficient. 1 Hovenden Frauds, 21; East India Co. vs. Donald, 9 Vesey, 282.

As to the boundaries and description of land sold, I cite 1 White & T. L. C. Eq., 724-741, 2 Parsons on Con. There is a sufficient description of a contract, if the court can ascertain its terms with reasonable certainty from the whole evidence. Rhodes vs. Rhodes, 3 Sand., 279-281;

Parkhurst vs. Van Cortlandt, 14 John., 13-37; Burns vs. Sutherland, 7 Barr., 103-106.

Acts of the Parties.—The acts of the parties can be taken as *indicia* of the true terms and meaning of the contract, and the intention when ascertained will be carried out. Broome L. M., 221. *Acta exteriorari indicant secreta.* The court will inquire as to the situation of the parties, their intentions and the object of the contract. 1 Story Eq. Ju., § 168; French vs. Cahart, 1 Comstock, 102, and authorities cited; 8 Howard U. S., 274; 13 Peters U. S., 89, 98, 99; Story Eq., §793.

What were the acts here? The contract is made; money paid. Tate continues his possession immediately after sale; he clears up the grove, prunes the trees, builds fences, sets out trees, takes the fruit and sells it from 1863, (the year the grove was sold,) for several years,and until he was ousted from the possession by R. L. Whitfield. There is no evidence of demurrer, no protest of Jones during his life, or of his representatives after his death.

Jones stood by for several months, from 10th of June, 1863, to December, 1863, and up to the time of his death, and saw the improvements made by Tate. There is not the least evidence showing that Jones interfered with the possession of Tate, or that he interposed any claim of title; and so with the heirs or representatives of Jones. See Story Eq. Ju., §§788, 793. That possession was open, public, notorious, as were the improvements of Tate. In fine, there was silence, acquiescence. *Qui tacet consentire videtur.* Silence implies consent, and such consent may be implied from the party's subsequent conduct. Broome L. M., 620. The doctrine of estoppel applies with full force to Jones during his life, and those claiming in privity with him in estate after his death. *Vide* Camp vs. Moseley, 2 Fla., — ; Ponder vs. Moseley, ib., 207; Hollinsworth vs. Hancock, 7 Fla., 338.

If one man knowingly, (says Chancellor Kent,) though he

does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by the equitable estoppel. Wendell vs. VanRensalaer, 1 John. Ch., 353.

Specific performance will be decreed when party cannot be placed in *statu quo*. 2 Story Eq. Ju., §§761, 774; 1 Hilliard on Vendors, 417; Broome on Stat. Fraud, §463.

But suppose estate insolvent, as it probably is. Story Eq. Ju., 760. Unless specific execution of the contract of sale is decreed, Tate would be regarded as a trespasser, and be liable to account for all the profits of the orange grove for a seriesof years,until it was wrested from his possession by the fraud and covenous entry of one of the defendants and the appointment of a receiver. A fraud would be practiced upon Tate if performance refused. Relief in these cases is administered on the ground of fraud. The statute was not intended as a guard and protection to fraud, but as a security against it. 2 Parsons on Con., 553-4; 1 Mad. Ch., 377-8; 1 Story Eq., §761; 1st Sug. V., 141; 4 Kent, 451.

Where agreement was intended, or promised to be put in writing, but it was prevented by fraud of one of the parties, equity will enforce the contract. 2 Story Eq., §768; Jenkins vs. Eldridge, 3 Story R., 181. So where death of one of the parties. 1 White and T. L. C., 740. So where fully performed on both sides. 13 Pick., 1; Scott vs. Newsome, 27 Georgia, 204.

Consideration.—It was adequate and valuable at the time of the contract. Even if inadequate, the court, in case there is no fraud, undue influence, and the like, will decree specific performance. Story Eq. Ju., §§244-45-46; 1 L. C. Eq., 590. Inadequacy of price must amount in itself to

decisive and conclusive evidence of fraud. Adams Eq., 78, note 79; Rogers vs. Surget, 19 Howard U. S., 303.

It cannot be contended that there was any fraud or undue influence practiced upon Jones. The court will not create a contract for the parties. The question of adequacy or inadequacy of price must depend upon and have relation to the value of the property on the 10th of June, 1863, the day of the contract of sale. The court can judicially know that at this period there was war, and of course, with its usual incidents and concomitants, pecuniary distress and embarrassment, and the depression of property in point of value to its lowest ebb. The value of the grove and its productions after the war is not to be taken into consideration, for its termination indubitably created a powerful reactionary influence upon the value of property generally, and orange groves especially, which assumed high speculative and even fictitious values. R. Lawson Whitfield himself says that the grove, when Tate took possession of it, was worth only $800, and $200 on the 28th of May, 1868. Stephen Page, a witness for defendant, says that when Tate bought it it was worth $300. Whitfield said that the oranges were sold at five and six cents each. Rhames and Thomas, witnessess for defendant,say they were worth three or four cents apiece. Whitfield says "that I value them (the oranges) in greenbacks, as I saw them bring it;" he is speaking of the sale of the oranges in 1863, 1864, 1865 and 1866. Were there greenbacks in Florida during the two first years?

In concluding my argument, I again respectfully refer to the position already taken, that possession alone, in pursuance of a contract, without any pretence of improvements, is sufficient to sustain a decree for specific execution. Parsons Selected Cases in Eq., 428-29; and that possession alone, without payment or other acts of ownership, is sufficient part-performance of a verbal contract for land to sus-

tain a decree for its specific execution. Browne Stat. Frauds, §467, and the large number of authorities in note 3.

Evidence as to improvements having been made upon land agreed to be sold under a verbal agreement, is certainly necessary where it is sought to rescind the contract; but in cases of pure specific performance they are regarded as establishing the *quo animo* the possession was taken, creating an *a fortiori* case of part-performance, and as "confirmatory of the rights of the plaintiff in seeking a specific execution of a verbal contract for a sale of land." Browne on Stat. Frauds, §487, and authorities cited, §478, ib.

THE CHIEF-JUSTICE delivered the opinion of the court.

This suit was commenced in 1866 by Jeremiah Tate in his life time against the executor and heirs at law of Robert S. Jones, for the purpose of enforcing the specific performance of an agreement, not in writing, for the conveyance of lands in Calhoun county alleged to have been made in June, 1863, between Robert S. Jones and Jeremiah Tate.

The bill alleges that Jones and Tate entered into an agreement, whereby Jones agreed to sell and convey to Tate the lands described for the sum of five hundred dollars, on which land was an orange grove situated on the west bank of the Chipola river, and that Tate paid to Jones the purchase-money in full, to wit: five hundred dollars; that Jones agreed to execute the necessary deed of conveyance, and have the same recorded in the clerk's office in a few days thereafter, he being then sick; that Jones put Tate in possession of the land, which possession he has continued to hold to the time of filing the bill, believing that Jones had performed his promises, and that he had, during his occupancy, made numerous and valuable improvements upon the property. Jones died in December, 1863, having failed to execute the deed.

The defendants answer that they know nothing of the alleged bargain and sale or the payment of the money, and allege that Tate was in possession of the land as the tenant, or by the permission of Jones, at and before the time of the alleged agreement; and they insist on the provisions of the statute commonly known as the statute of frauds as a bar to the right of action for a specific performance of the alleged agreement.

After taking testimony, the case was submitted to the court, and a decree was made upon the facts as found by the court directing the defendant to convey the premises as prayed in the bill of complaint. From this decree the defendant appealed.

The only questions presented in the argument are upon the effect of the statute of frauds, and the sufficiency of the proof to take the case out of the operation of the statute.

The statute is as follows: "No action shall be brought whereby * * charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, * * unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." Thomp. Dig., 217-218, act of November 15, 1828.

"The whole class of cases," says Story on Eq. Jurisprudence, §741, "of specific performance of contracts respecting real estate, where the contract is by parol, and there has been part-performance, or where the terms of the contract have not been strictly complied with, and yet equity relieves the party, are proofs that the right to maintain a suit in equity to compel a specific performance, does not and cannot properly be said to depend upon the party's having a right to maintain a suit at law for damages." 2 Sch. &

Lef., 347-8, 684; 13 Ves., 228; 1 Sugden, Vend., c. 4, sec. 2, 246-7, 9th ed.

"If an agreement be by parol, and not signed by the parties, or some one lawfully authorized by them, if such agreement be not confessed, as is said, in the answer, it cannot be carried into execution; but if it be carried into execution by one of the parties, and such execution be accepted by the other, he who accepts it must perform his part. As if A. sells his estate to B. by parol for one thousand pounds, if A. accepts the one thousand pounds, or any considerable part of it, he must convey his estate to B., for otherwise it is a fraud to accept the money of B. and not convey it. And it could never be the intent of the statute (which was to hinder bargains from being sworn upon men that they never made) that men should take advantage of not completing bargains which they had made, and which were actually performed to them; for when there is a performance the evidence of the bargain does not merely lie upon the words, but upon the fact performed, of which they have reaped the advantage; and it is perfectly unconscionable that the party who has received the advantage of the verbal contract should be admitted to say such contract was never made; for the law must be construed according to natural equity, and not to create a fraud; and the person that receives money and does not convey is plainly guilty of a fraud, and therefore must not be permitted to insist that he did not sign, when he has received all the benefit he could have had by such signing, for that were to construe the statute against frauds so as to protect fraud and not suppress it." Lord Chief Baron Gilbert, Lex Prætoria, C. I., 232-233, citing Leake vs. Maurice, Eq. Abr. 23, p. 20, 2 Ch. Cas., 135.

The cases cited by Baron Gilbert contain the earliest interpretation of the statute of 29 Car. II., of which the stat-

ute of Florida is a substantial copy. See also 1 Story's Eq. Jur., §759, and authorities cited.

Sir William Grant, in Frame vs. Dawson, 14 Ves., 386, says: "It is admitted that supposing an agreement ever so clearly proved, yet, as a parol agreement, the plaintiff is not entitled to have it executed. It is necessary, therefore, to show a part-performance; that is, an act unequivocally referring to and resulting from the agreement, and such that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement."

And Browne on the Statute of Frauds deduces from a large number of American authorities, in section 465, the following: "Although payment alone is not sufficient, yet it may serve to corroborate other acts which are generally regarded as amounting to part-performance, so as to afford ground for a decree of specific execution. Where, for instance, it is accompanied by a purchaser's entering into possession of land in pursuance of a verbal contract for the purchase of it, a case of part-performance is quite uniformly considered to be shown."

In Mississippi, and one or two other States, the courts have construed the statute so strictly as to refuse to enforce the specific execution of parol contracts for the sale of lands, even where there has been entire performance on the part of the purchaser by payment and taking possession under the agreement.

The question comes before the court in this State for the first time in the present case. If we were to confine ourselves to the strict letter of the statute, and say that no power resides in the courts of equity to decree a conveyance of land in pursuance of a parol agreement to convey, notwithstanding the fact that the seller had received the full price agreed on, and had also in pursuance thereof put the purchaser in possession, or induced him to improve it, or fix his residence upon it, we should go far towards ab-

dicating one of the most important functions of chancery jurisdiction; a step which, after the beneficent action of the courts in England and in this country, and in view of the principles upon which they have acted, we cannot take.

In our judgment the statute should be construed so as to give it the full force and effect intended, and nothing beyond that. A *mere* parol agreement to sell lands cannot be enforced at law or in equity, but when one has agreed to sell, and has taken his price and delivered possession, he is estopped in equity from setting up the fact that he has obtained his neighbor's money and induced him to change his situation upon an agreement which he insists may not be enforced against himself, but the full benefit of which agreement he enjoys as fully as though he had executed it, for the evidence of the agreement no longer rest upon mere words, but "upon the fact performed of which he has reaped the advantage," and he "cannot be permitted to say such contract was never made," nor that he shall not complete what he had commenced to another's injury.

Formerly it was held that payment of the purchase-money alone was such part-performance that a specific execution would be decreed, but it seems that this fact alone is not now held to be sufficient, for the payment of money is not necessarily referable to a contract for the sale of lands. "The principle of the case is, that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted." Frame vs. Dawson, 14 Ves., 386.

But beyond announcing the rule which we hold should prevail in this State, where the common law of England has been enacted by express statute, and where the general principles of equity jurisprudence, derived from that country, have been recognized, it is not deemed necessary to go, nor to attempt an elaborate examination of the cases adjudicated. We adopt a rule elsewhere established. In a recent

case, (Purcell vs. Miner, 4 Wallace, 513,) the Supreme Court of the U. S. says that when a party seeks a court of equity to save himself from the consequences of his own disregard of the law in purchasing lands, "he should be held to full, satisfactory, and indubitable proof:

"*First.* Of the contract and its terms. Such proof must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus paenitentiae.*

"*Second.* That the consideration has been paid or tendered. But payment of the price, in whole or in part, will not of itself be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money.

"*Third.* Such a part-performance of the contract that its rescission would be a fraud upon the other party, and could not be fully compensated by recovery of damages in a court of law.

"*Fourth.* That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party."

In that case one Coleman had agreed with Purcell to exchange a house in Washington for a farm in Virginia. The value and terms were agreed on, and Coleman delivered the key of the house to Purcell, and he, Purcell, was to prepare the necessary deeds to be executed by both parties. Purcell prepared the deeds, executed his own, and tendered it to Coleman, requesting him to execute the deed on his part; but Coleman refused, and conveyed the house to Miner. Purcell never had the undisputed possession of the house, although he had received the key. He then, upon these facts, filed his bill for specific performance.

The court remarks, that "if either party had delivered the deed in execution of the trade or bargain, and the other had refused to fulfill his part, by making a proper conveyance, or if valuable improvements had been made by the

party in possession, (under the agreement,) there would have been a case for a decree of specific execution." But because the price was not paid, nor the deed delivered, and no actual possession had been delivered of the house itself, Coleman had taken advantage of the *locus paenitentiae* and refused to receive the price, to deliver possession, and to execute his deed, and the court refused the decree. It will be observed that neither of the parties in that case had parted with anything of value, and no actual possession had been given, and no action would lie by either party.

The case of Purcell vs. Miner is cited by the appellants here, and we believe contains the rules upon which this case should be determined.

In examining the voluminous testimony it will be unnecessary to give here more than the substance of it, and the conclusions which result from it.

First, then, as to the proof of the agreement. The witness, Adaline Shaw, states that she was present when a bargain was made between the parties in June, 1863, for the sale by Jones to Tate of the orange grove in question, situated on the west side of the Chipola river or Dead Lakes; that the price was $500; saw the money paid; Jones said there is $500 for the orange grove; Jones wanted to sell Tate also some lumber on the place, and Tate declined to buy it; Tate was then living on the place; Jones said he would make a title "as soon as Clark came over."

Mary Jones, the widow of Robert S. Jones, says in her answer, that some time before Jones' death, at Jones' house, she heard Tate and Jones speak of a *contemplated purchase of the place,* but saw no money pass or any writing, and heard no contract of sale.

Duncan Shaw says that in 1863 Jones told him he had sold the orange grove on the west side of the river to Jeremiah Tate for $500. Samuel W. Davis says that in 1863 he went to Jones to buy the orange grove property for one

Captain Bryant, and Jones said he had just sold it to Tate for $500; Jones permitted Tate to move on before the trade was made; the purchase spoken of was before Tate built his house there, and Tate continued to occupy the premises, and sold oranges from the place that year and up to this date, (1868); Tate lived there in the fall of 1862; commenced improving the place after he bought it, setting out trees and pruning those already there; the place is worth about $2000, (1868); Jones got the first crop after Tate went there, and afterwards Tate had them; Tate built a common log house and enclosed five acres; I carried lumber there for Tate, and also 200 bushels of corn.

John Jones says he heard Jones say, sometime in June, he had sold *both* places, Jack's Hammock and the mill place, to Tate, and had been paid for both places; that he was old and was not able to take care of them.

Nathan J. Rhames says Tate had about eight acres under enclosure; the houses were small log houses.

Mary Lee (daughter of Tate) says when father came home and said he had bought the place, he commenced manuring and setting out trees; the place is worth (1868) $2000; Jones' lumber was hauled off the place, in 1863; Mr. Jones told father to go to the place and take care of it before father bought it; about two acres were then under cultivation.

Seaborn Tate says Jeremiah Tate made improvements on the "old mill" place while he lived there, from 1863 to 1866, cleared the orange grove, made fences, planted out trees and divided some trees; it is valuable only on account of the orange grove; some lumber was hauled away in 1863; Tate was put in possession by Jones to take care of it, about two acres then under cultivation; Tate built no houses or fences except for his own benefit.

Robert J. Taylor says he heard Jones say at the blacksmith's shop he had sold Tate an orange grove, and had got

$500 for it; don't know what place he spoke of; Tate was living on the "old mill place" in 1863, on the west side of the Chipola river; the place is valuable on account of the orange trees on it, and without the grove it is worth very little.

Rolly Richards says he estimates the value of the "old mill place" at $2,500; Tate's improvements were in setting out trees, fencing, and building a dwelling-house; in spring of 1868 I held possession of the place for Tate; went away leaving a gun there, and nailed up the door; told L. Whitfield when I went away I was going across the lake but would attend to the place; am told that Redd and Rhames now occupy it, (1868).

James Register says he heard Jones say in 1863 he had sold his orange grove on the west side of the lakes to Tate, and Tate had paid him $500 for it that day, and could not make the title as he was then sick; Mrs. Shaw was there about the house; don't think she was present at this conversation.

Alexander Hawkins says there were 50,000 oranges raised there in 1866, worth three to four cents each in the orchard; saw some lumber there, and the grove looked like it was well cared for; the place is worth (1868) $1,500; the trees in 1866 were in better condition than when Tate went there, and the place is worth more.

For the Defence.—Wm. A. Whitfield testifies that he was present in June, 1863, when Jeremiah Tate made a trade with R. S. Jones for an orange grove in Calhoun county, at Jones' house; saw $200 paid by Tate to Jones for an orange grove, the place where I was living at the time; it was the place called "Jack's Hammock," in the forks of the rivers; Tate was not living there at the time, but moved to it as soon as I moved out; I had bought it of Jones, and had not paid for it; the money paid by Tate was $200, in bills of the State Bank of Florida; Jones immediately went out

into the other room with the money in his hand, and called for the bureau key; if Mrs. Shaw saw the money it was then, before he locked it up, as she did not see it when it was paid; Tate was not living on either place at this time; there was no lumber on the place he bought; never heard Tate claimed to have bought the place on the west side of the Chipola until after Jones' death; the place on the west side is worth (1868) $600; Tate took possession of the "Jack's Hammock" place on the first of December, 1861; there was about eighteen acres of it; Tate did not make any valuable improvements on the place on the west side of the river, not enough to pay the rent.

William Redd says heard Jones speak of having sold Tate the orange grove in the forks of the Apalachicola and Chipola rivers; the "old mill place," on the west side, is now (1868) worth about $300, with the orange trees on it; Mrs. Shaw was living at Jones' while I was there, and quit before I did; she was not there when the pretended sale claimed by Tate was made for the old mill place orange grove.

Robert L. Whitfield says I put Tate into possession of the orange grove on the west side of the river until he could build upon his own place near the orange grove, and to take care of the grove; it was in better condition when he went there than in 1866; the improvements that had been made were worth about $300; Mrs. Shaw was not at Jones' at the time of the pretended sale of the orange grove on west side to Tate, but was there at the time of the sale of the orange grove between the rivers; oranges were worth in 1863 to 1866, 5 to 6 cents each; about 50 to 60 thousand were produced then on the west side grove annually; Tate said if I would let him go on the place he would pen his cattle there and take care of it and keep it in repair; the place was worth $800 when he went on it, and is not worth more than $200 now (1868); it had decreased in value.

Joseph Willis says the place was in a bad state when Tate went on it; one house, one old crib, and old smoke-house—all log houses; in May, 1866, it was in about the same condition as when he went in; don't think there were any more trees than when he went in; the trees were in better condition than when he went in.

Stephen Page, Wm. Redd and Levi Rhames testify that the buildings on the place were of little value; that Tate made little or no improvements on it, injured the trees, set out very few, if any, new trees. Page thinks the place worth $300 when Tate took possession, and now (1868) $250. Nathan J. Rhames says he is now occupying the place; went in in March, 1868, at the request of R. L. Whitfield, and holds it for the Jones estate; no one was there when he went in; the house was open and the place abandoned, fences down, nothing in the houses; Tate lived fifty miles away and Richard five miles.

There was much more testimony in the record relating to the manner in which the premises had been treated, cultivated, improved or depreciated, of the same general character, which it is not deemed necessary to read, as it does not affect the judgment of this court. Indeed, from the manner of taking the testimony, much of it is not very intelligible.

It was insisted in the argument of the case that the proof of the agreement was not satisfactory, because the testimony of the plaintiff's witnesses was contradicted, and because it was not direct and reliable. We think it is shown that an agreement was entered into as set out in the complaint. The answer of Mrs. Jones admits that a negotiation relating to this property was going on between her husband, Robert S. Jones, and Jeremiah Tate, some time before Jones' death, which occurred in December, 1863. Mrs. Shaw testifies that she was present when a trade was made, and saw the money paid, and Jones said it was five hundred dollars for the orange grove where Tate lived, (being the property de-

scribed in the pleadings.) This occurred in June, 1863. Duncan Shaw, Samuel Davis, John Jones, R. J. Taylor and James Register, all swear that about the time named, (and one or two of them on the same day on which the agreement is alleged to have been made,) they had conversations with Jones in which he said he had sold the property to Tate, and had been paid for it. Mrs. Shaw says Jones wanted to sell to Tate some lumber on the place, and that Tate declined to purchase it. Mary Lee and John Jones say the lumber was hauled away during that summer from the place Jones sold to Tate; and the proof further shows that Tate procured other lumber to be brought there for building purposes, and that he built a house there.

This testimony shows the agreement, the terms, the identity of the property, the price paid, and two or three of the witnesses say that Jones gave as a reason why the title was not made at the time was that he was sick. This was in June, and Jones died in December. Against this is the testimony of Wm. A. Whitfield, who says that about June, 1863, he was present when Jones sold to Tate an entirely different property on the other side of the river; that the price paid by Tate for it was $200 in notes of the State Bank of Florida; that it was a place where he (Whitfield) lived, and that Tate took possession of it the same year when he moved away from it; that Mrs. Shaw was present at Jones' house, but did not hear the bargain, nor see the money paid; that Tate was not living on either place at the time; there was no lumber on the place so sold; and finally winds up by stating that this transaction was in 1861, instead of 1863. The effort of this witness seems to be to show that Mrs. Shaw was mistaken as to the time and subject-matter of the bargain. If anything further was necessary to dispose of this testimony, it may be found in a stipulation on file in this record, signed by the respective counsel, that the payment was made, if at all, in Confeder-

ate States notes, while this witness says the payment was made in the notes of a particular description of the State Bank of Florida, which were counted out by the witness at the time. The only solution of this may be found in the testimony of one or two of the witnesses, who state that Jones said he had sold to Tate *both* orange groves, and had been paid for both.

The testimony of Mrs. Shaw is also said to be shaken by that of R. L. Whitfield and William Redd, who both state that "at the time of the pretended sale" of the "old mill place" by Jones, as claimed by Tate, Mrs. Shaw was not there, as she had stated. They do not show where she was. (It may be thought that this is an attempt to show that a circumstance stated by her did *not* occur at all, and that she was not present when it *did* occur.) James Register says, however, that Mrs. Shaw was at Jones' house in 1863 on the day that Jones said he had sold his orange grove on the west side of the river to Tate, and had been paid $500 for it *on that day*. Indeed the only serious attempt at contradiction is aimed at the testimony of Mrs. Shaw, and the attempt scarcely raises an issue of veracity between the witnesses; but if such issue is raised, we find her sustained so fully and plainly by several others as to collateral facts, as to the time and terms of the agreement, the payment, the amount paid, the property bargained for, and the title to be made, that there can be no doubt of her entire truthfulness.

The agreement is, therefore, found to be fully and satisfactorily proved as alleged, and the payment of the purchase-money is proved beyond question, not only by the direct testimony of Mrs. Shaw, but by the direct declarations of Jones to several witnesses.

Next as to the possession. It appears that Tate was in possession of the premises as a tenant, or by the permission of Jones, at the time the agreement was made. R. L. Whitfield says he put Tate into possession of the orange grove

"to take care of the place until he could build upon his own place near there." "Tate said he would pen his cattle there, and take care of it and keep it in repair." This was in 1862. It appears that immediately after the time of the contract, in June, 1863, Tate commenced to treat the place as one would naturally do with his own property. The lumber belonging to Jones was carried away by his servants, though it was of very little value. Tate brought lumber and materials and proceeded to build a house, not on "his own place near there," but upon the orange grove premises. That it was a log-house, and not a large or expensive one, is of little consequence. He commenced to set out trees; to divide old trees and reset them, and to trim and prune them; and some were injured by too much pruning, as the witnesses think. It does not appear that he improved "his own place near there" after that time. Prior to the making of the agreement, the crop of oranges was had by Jones, and after the agreement the crop and the proceeds were had by Tate, and it does not appear that Jones or his widow and heirs made any claim to the crop or to the property until after the present litigation commenced in 1866. Tate remained there with his family, instead of going to live, as he had contemplated, upon "his property" near it, and no complaint appears to have been made by Jones or his family of the manner in which the place was conducted by Tate. Everything that Tate did after the agreement seems to have been with reference to proprietary rights. The erection of a dwelling-house, the enlarging of the enclosures by fences, and of the quantity of land cultivated, and establishing his domicil with his family there for years, is not consistent with the idea that he was a mere tenant at will, "taking care of the place until he could build on his place near." It cannot therefore be assumed upon all these facts that he was merely "continuing the possession" as the tenant of Jones. It is claimed that he abandoned the possession of

the place, and the evidence shows that he did leave with his family in 1868, two years after this suit was commenced; but it is shown that he left a tenant in charge of it, and that during the temporary absence of the tenant some of the defendants entered and took possession without his consent, and have continued such possession pending this litigation. There is nothing in the circumstances of Tate's leaving the premises in this manner which tends to weaken the claim set up by him as a purchaser in 1863.

As to the value of the improvements there is no precise rule, and none can be established, by which a certain amount of money must be expended in order to establish a right. It has been said that if the improvements are "valuable," and are made in pursuance of the agreement, and are referable to it, this will take the case out of the statute; or if possession has been delivered and acquiesced in by the other party, in pursuance of the agreement, this takes the case out of the statute, (Purcell vs. Miner, 4 Wallace,) and there is a case for a specific execution. The witnesses for the defence pretty generally agree that the property in question is of very little value, and depreciated much while Tate was in possession, from June, 1863, to May, 1866, its value being fixed by them at $200 to $600 in 1868, while at the same time some of them say the place produced fifty to sixty thousand oranges annually, worth 3 to 6 cents each. The witnesses for the plaintiff agree (as to the productiveness of the orchard) with the witnesses on the other side, while they estimate the value of the property in 1868 at $2,000 to $2,500.

The testimony of the witnesses as to the improvements varies in about the same ratio. Some of them say that some seventy-five trees were put out, and the orchard kept in good condition by Tate, while others say there are but two or three trees set out by Tate, and the rest of the grove nearly ruined by his bad treatment. The plaintiff's witnesses say

that Tate built a dwelling-house and out-buildings, while the defendants' witnesses say that there were no buildings of any great value erected, the houses having been built of logs. There is no rule that houses or other improvements should be built of wood or stone, hewed or sawed, worth $100 or $10,000; the question is whether the price being paid and possession being given or retained under the agreement to sell and convey, the fact of the improvements being made and the character or value of them are such as to show that they are consistent with the theory that what has been done has been done with reference to the agreement, and inconsistent with any other legitimate presumption.

The testimony of the witnesses on the part of the defence, as to the value of the property, as we have seen, is somewhat extraordinary. Notwithstanding their statements that Tate's method of treatment of the orange trees which they say has depreciated the value of the place so that at the time they were testifying (in 1868) it was worth only from $200 to $600, yet they prove that some years after 1863 it produced fifty to sixty thousand oranges annually, worth 3 to 5 cents each, or upwards of $2,000 per annum; while Jones sold it for $500 in the prevailing currency in 1863. Either these witnesses are mistaken in regard to the proper treatment of the property by Tate, or they are mistaken in their judgment of the value. Our conclusion is from all the evidence as to the possession and the improvements made by Tate after the alleged agreement, that notwithstanding he was a tenant of Jones in the first instance, yet the character of the possession after June, 1863, and the acquiescence of Jones and his heirs and representatives since that time, were inconsistent with the terms of that tenancy, and were consistent with and are deemed to be evidence in support of the alleged agreement to convey to Tate.

This is consistent with the rule of equity in cases of this character as administered in this country in all the States,

except two or three in which no exceptions to the statute are allowed. (See 1 Story's Eq. Jur., §§759 to 770, 11th edition, and the English and American cases cited on this subject.)

The decree of the Circuit Court is affirmed with costs.

The appellants filed the following petition for a re-hearing:

To Hon. Edwin M. Randall, Chief Justice, R. B. Van Valkenburgh and James D. Westcott, Jr., Justices of the Supreme Court of Florida:

The petition of appellants in case of Jones' executor vs. Tate's administrator, respectfully shows that they are advised that there is error in the judgment of this court affirming the judgment of the Circuit Court of Jackson county in this—

1. That there is no sufficient proof made by the appellee of part-performance of the alleged contract of sale of the lands described in bill of complaint as will dispense with the requirement of the Statute of Frauds that such contract should be in writing.

2. That the testimony relied on to establish the verbal contract itself is contradictory and conflicting, and is not "full, satisfactory and indubitable."

3. That the testimony relied on is hearsay, and declarations of one party or the other to strangers to the transaction, which, it is insisted, is not the character of proof required in such cases.

4 That it is not sufficient that the verbal contract be sustained by proof that inclines the mind to its belief, but it should be sustained beyond a reasonable doubt, such as is required in criminal cases to convict.

5. That the same character and degree of proof is required to establish the facts relied on to take a case out of the operation of the Statute of Frauds, to-wit: of *payment, delivery*

of *possession, valuable improvements,* &c., as is required to establish the contract itself; and appellants allege that the proof, particularly of possession, and improvements referable to the alleged purchase, are too vague, contradictory, and unsatisfactory to bring the case within the exceptions to the statute.

6. Admitting that there was a verbal contract of sale by Jones to Tate, and payment of $500 Confederate money, appellants claim that a *locus paenitentiae* existed in which Jones had a right to return the money and repudiate the purchase, and in which Tate had the corresponding right to sue for and recover the purchase-money; and a sufficient reason is found for the non-exercise of this right on the part of Jones in his condition of health at the time of the alleged sale, and his early death thereafter. A sufficient explanation of the non-action of the representatives and heirs of Jones, in dispossessing Tate of the premises, is furnished by the existence of war in the country from the death of Jones to the spring of 1865. *Inter arma silent leges.* The confusion and disorganized condition of the country, and its tribunals, immediately on the close of the war, and the expectation that it is fair to assume the parties indulged, that all the rights of the parties would be fully and promptly adjudicated and settled by the decree of the court in this case, which was instituted the — day of ——, A. D. 1866.

7. That the court erred in assuming acquiescence on the part of Jones in his life-time, or his representatives after his death, in the alleged acts of ownership of Tate over the lands, inconsistent with his rights of occupancy, without proof of the knowledge by Jones, in his life-time, of such acts, and after his death and before the institution of this suit, in 1866, by his representatives. The record (we have not access to the record, and this we state from memory,) contains no proof of any claim of ownership by Tate prior to the institution of this suit, and of course no knowledge of

such claim can be imputed to Jones' representatives, appellants insisting, as they have always done, that his improvements were of small value, and for his own convenience as tenant at will and entirely consistent with his tenancy. "He was to take care of the place and pen his stock on it." The record contains evidence of the assertion of ownership by Jones on his death-bed. (Testimony of Yon.) This is strongly corroborative of the ignorance of Jones of any claim of ownership by Tate, and disproves the alleged acquiescence of Jones.

8. That the court erred in discarding the *value* of the improvements made as an element in determining whether they were made with reference to the parol contract of sale, because a party is not apt to make large expenditures on property that he holds as tenant at will, and where the improvements are only of small value, they are consistent with such tenancy, and are not necessarily referable to a purchase of the property, which appellants are advised the rule requires.

For these reasons, and that justice may be done between the parties, your petitioners pray the said cause may be reheard by this honorable court.

And as in duty bound your petitioners will ever pray, &c.

C. C. YONGE,
J. F. MCCLELLAN,
Solicitors for Petitioners.

The following opinion, denying the petition for a re-hearing, was delivered by THE CHIEF JUSTICE:

The petition in this case for a re-hearing is considered without reference to the question of regularity as to the time of filing it, and without admitting that it is strictly brought within the rules.

The petition is substantially a repetition of the grounds

relied upon in the petition of appeal. Every point made is fully treated of in the opinion delivered at the last term. The record of the case is somewhat voluminous, and it was no small task in the examination of it to ascertain precisely what the proof was upon many points; but the necessary labor was bestowed upon it to satisfy the court that we had possessed ourselves of every fact essential to an intelligent understanding.

Upon reviewing the record and the opinion filed, aided by the suggestions in the petition, we are unable to arrive at a conclusion upon the facts or the law of the case other than that found in the opinion. We think nothing was "assumed" by this court in regard to the facts beyond what seemed to us clearly established by the proofs in the case. The resume of the evidence contained in the body of the opinion embraces every material fact bearing upon the merits, so far as we could discover the facts from the record, and upon a careful re-examination we do not find ourselves called upon to add to or take from the statement there made. The testimony in regard to the assertions of ownership by Jones, after the time of the alleged agreement, in the absence of Tate, if it clearly referred to the premises in question; was of no more importance than the proof of the declarations of Tate, both of which were rejected as not being legitimate evidence.

The petition for a re-hearing is denied.

S. B. BALDWIN, APPELLANT, vs. J. H. TUCKER, TAX COLLECTOR OF MONTICELLO, APPELLEE.

A court of equity will not entertain a bill for an injunction against a tax-collector who threatens to seize personal property without lawful authority, as such seizure would be a mere trespass remediable in a court of law.

Appeal from the Circuit Court for Jefferson county.

The facts of the case are stated in the opinion of the court.

John A. Henderson for Appellant.

Samuel Pasco for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This is a bill for an injunction against Appellee as tax collector of the town of Monticello, to restrain him from levying upon complainant's property for a "license tax."

Complainant alleges that he is engaged in the business of selling liquors at retail in Monticello, and that he is liable to pay for a license to carry on the business not exceeding the sum of fifty dollars, but that the town council of Monticello have passed an ordinance assessing upon retailers of liquors the sum of one hundred and twenty-five dollars each for a license, whereas, it is alleged, the council is prohibited from levying a greater sum than fifty dollars for a license. Although this sum has not been duly assessed against him, yet the defendant, as tax-collector, threatens to levy and collect by distress of the goods and chattels of complainant the said sum of one hundred and twenty-five dollars; that appellant is willing to pay the sum of fifty dollars; but unless restrained by injunction the collector will enforce his threat, and compel him to pay the sum so unlawfully demanded.

The circuit court refused an injunction, and dismissed the bill for want of equity, whereupon the complainant appealed.

The whole charge in the bill is that the defendant threatens to commit a tresspass upon the personal estate of the complainant.

The allegation is that he threatens to seize complainant's property without process, without authority of law, or the pretence of satisfying an excessive amount demanded for a license.

So far as the court of equity is concerned, the tax collector stands in the position of any private person threatening to seize the property of another unlawfully.

The courts of chancery have uniformly refused to grant an injunction to restrain the commission of a mere tresspass, except in rare cases, where the mischief would be irreparable by reason of some extraordinary value or quality of the thing endangered. This court has so held in a number of cases. Bryan vs. Long, 14 Fla., 366; McCollom vs. Morrison, ib., 414; Bowes vs. Hoeg, 15 Fla., 403; Davidson vs. Floyd, ib., 667, and authorities cited.

The question in regard to the amount which the municipality is authorized to exact for a license, under the statutes, was presented in the argument, but as this question does not enter into the case in the view we have taken in disposing of it, any opinion we might express on that subject would determine nothing.

The decree is affirmed.

JOHN A. MCDONALD, APPELLANT, VS. A. B. RUSSELL, APPELLEE.

Where it is charged in the bill filed for the purpose of subjecting certain land to sale under an execution against M., that the property had been purchased by M. of one S. who had conveyed it to B. in trust for and at the instance of M., in fraud of the judgment creditor, but no privity is charged against S.: *Held*, that S. is not a necessary party to the suit.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion of the court.

Thomas Emmett Wilson for Appellant.

W. J. Barnett for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

The bill charges that Russell obtained several judgments against appellant upon which execution had been issued, and that appellant had purchased of H. S. Sanford certain real estate, but that at the instance of appellant Sanford had conveyed the property to McDonald, and afterwards executed a deed of the same to one Boyd, a co-defendant named in the bill, and that Boyd held the land in fraud of the rights of complainant, and prays that it should be subjected to the payment of the judgments. No fraud is charged against Sanford, nor any other fact, except that the land was conveyed by him to Boyd. The defendant Boyd demurred to the bill upon the sole ground that Sanford was a necessary party to the suit, according to the statements of the bill. The Circuit Judge overruled the demurrer, and from this order McDonald appealed.

The judge committed no error in overruling the demur-

rer. The presence of Sanford was entirely unnecessary to the final determination of the rights of the parties. He is charged with no complicity in, or knowledge of, the fraud charged against the other parties. It is alleged that Sanford had conveyed the land to McDonald, and afterwards, at the instance of McDonald, executed another deed to Boyd, and the bill seeks to set aside the later deed. The setting aside of this deed, and subjecting the property to the lien of the judgments, is of no consequence to Sanford, and his presence as a party is of no importance to any of the other parties named. No relief is prayed as against him or affecting him, and the facts charged give no foundation for any prayer as against him; he is merely a witness as to these parties, and this being the case, the demurrer was properly overruled. Story Eq. Pl., §231; Story Eq. Jur., §1,499; Mitford Ch. Pl., by Jeremy, 188.

The decree is therefore affirmed with costs.

CATHERINE C. CAVEDO, APPELLANT, VS. LIBERTY BILLINGS ET AL., APPELLEES.

A suit in equity to recover the possession of lands under a legal title, and for mesne profits, cannot be maintained. All the issues of law and fact in regard to the title and the rents and profits may be tried in a court of law.

Appeal from the Circuit Court for Nassau county.

The appellant was complainant in the Circuit Court, Billings and James E. Meddaugh being defendants.

The other facts of the case are stated in the opinion of the court.

John Friend for Appellant.

Liberty Billings for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This suit was commenced in 1875 by complaint in the form of a bill in equity to recover certain lots in Fernandina occupied by defendants; to recover rents and profits; to set aside certain deeds and certificates of sale by U. S. tax commissioners, alleging that the tax sale was illegal and fraudulent, and alleging that Billings has been in possession and enjoying the rents and profits from February, 1866, under a deed from Cæsar Baker to him, Baker having the certificate of the U. S. tax sale, which certificate and sale are said to have been fraudulent and void.

The bill prays the appointment of a receiver, injunction, and delivery of possession of the premises to the complainant, and payment of rents and profits. Complainant states that in 1858, the premises were leased in writing for ninety-nine years by Soutter and McRae to John S. Cavedo and J. J. Acosta, complainant's son and nephew, who held the same in her behalf, she being the party in interest as lessee, the lease containing a covenant for title upon conditions: that she entered into possession under this lease, and built upon the premises, and occupied the same until 1862, when she left the town and remained away until the tax sale, and has not since been in possession.

The defendants demurred to the bill; that she does not show her right, title or interest in the premises; that the bill states a case showing that she is not entitled to relief in equity because of the statute of limitation, and upon the general ground of want of equity.

The court sustained the demurrer and complainant appealed.

If a bill is for the possession of land, or an *ejectment* bill, as it is called, it may be demurred to even though the bill

charges the defendants to have got the title deeds, and to have mixed the boundaries, and prays a discovery, possession and account; for the plaintiff, though he may be entitled to a discovery, has rendered his whole bill liable to demurrer. (1 Dan. Ch. Pl. and Prac., 3 Am. Ed., 575-6.) For although the plaintiff would be entitled to the discovery of the title deeds, yet he would not have any title to the relief, that relief, after the discovery, being properly to be given at law. The proper redress for the possession of land is at law. Story's Eq. Pl., §476; 3 Ves., 4; ib.. 343; Cooper's Eq. Pl., 125; 2 Ves., 459.

The complainant, if entitled to the possession of the premises, may have her action at law for recovering it, and may have the rents and profits in the same action. The act of 1859, (ch. 999,) expressly secures this right: or he may have his action for the rents and profits after establishing his title in ejectment. (Adams on Eject., ch. 13; City of Apalachicola vs. Apalachicola Land Co., 11 Fla., 340.) The courts of chancery have uniformly refused to entertain suits for recovering the possession of real property under a legal title, on account of the want of jurisdiction. It is urged, however, that the court should entertain this suit, on the ground that the complainant has been deprived of her possession by fraud. The fraud charged consists in the unlawful conduct of the tax commissioners in the sale for taxes, and the unlawful seizure of the possession under that unlawful and "fraudulent" sale. There is not in this case any fraudulent act charged beyond the illegality of the proceedings of the tax commissioners. This is not such a charge of fraud as will give a court of equity jurisdiction. In ejectment, the illegal or fraudulent character of the sale or any deed, or muniment of title set up, may be shown, and as such fraud is a question of fact, it is entirely cognizable in a court of law.

The entire relief sought by the bill as to the possession

of the premises and the recovery of mesne profits, may be had in a court of law. It is unnecessary to examine the question of the effect of the statute of limitations, as that issue may be made, and the legal rights of all parties in that respect tried in ejectment, where the issues may be properly made upon the law and the facts.

The decree of the Circuit Court must be affirmed.

CATHERINE S. HART, AS EXECUTRIX AND IN HER OWN RIGHT, APPELLANT, VS. SANDERSON'S ADMINISTRATORS, APPELLEES.

1. Where there is a plea and an answer in support thereof, the answer cannot be regarded as a defence independent of the plea. When such a plea is set down for argument, the matter of the answer should be considered in connection with the plea, and an order overruling the plea disposes of the plea and answer.
2. Where in such case the court, in disposing of the plea, confines itself to the consideration of the formal plea, independent of the answer in support thereof, it is error.
3. After the plea is overruled in such case, it is error to set the cause down for hearing upon the bill and the answer in support of the plea.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

Ives & Dawkins for Appellant.

Fleming & Daniel for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a bill to foreclose a mortgage executed by husband and wife upon real estate, embracing their place of residence at the time of its execution. The bill is brought by the administrators of J. P. Sanderson, deceased, the mortgagees,

against the wife of the mortgagor, in her own right and as executrix of the will of her deceased husband. In the Circuit Court there was a decree for the sale of the mortgaged premises. From this decree this appeal is prosecuted. The first ground upon which a reversal of the decree is sought, as stated in the petition of appeal, is for the reason "that on the 11th day of September, A. D. 1875, leave was granted by the court to complainants to withdraw their general replication filed by them, and to except to the answer, and to set down defendant's plea for argument as to its sufficiency." This ground is not insisted upon in argument, and from the general treatment of the case by the appellant, we must regard it as abandoned. Besides, we can discover no reason why such leave should not have been granted. It certainly did not prejudice the defendant in the Circuit Court.

The mortgage was executed in due form by the husband and wife, and contained the following recitals and covenants, all of which the bill sets up, viz: "It is understood that the money to secure the payment of which this mortgage is given was borrowed by the grantors from the grantees to pay for improvements made on a part of the mortgaged premises, and the grantors hereby waive all benefit of exemption and homestead, and stipulate that the same shall never be claimed to the prejudice of the grantees, their successors or assigns." In the separate examination and acknowledgment of the wife, she acknowledges that she made herself a party to and executed the deed of mortgage for the purpose of conveying and mortgaging all of her estate *in esse* and *in futuro* in the lands therein described, and that she executed the same freely and voluntarily, and without any compulsion, constraint, apprehension or fear from her husband.

The defendant filed a plea and an answer in support thereof. The plea sets up that a portion of the premises had been occupied by the said Ossian B. Hart, in his life-time, as a

homestead; that an absolute and unconditional fee was vested in him, and since his death had descended to the defendant as his widow and sole heir; that said homestead is and was exempted from forced sale under any process of law, and was never alienated or conveyed away according to the terms of the constitution. The answer in support of the plea sets up that at the requirement of her late husband and testator, the said Ossian B. Hart, she did join in the execution of said indenture of mortgage, and signed her acknowledgement thereof, before Charles H. Summers, a notary public; but she denies that she did so voluntary and without any compulson, apprehension, or fear of or from her said husband, the statement in said acknowledgement to the contrary notwithstanding; that it is true that no actual force or violence was employed, but well grounded apprehension and fear that unless she signed the same the peace and happiness of her marriage relation with her husband would be materially disturbed if not totally destroyed, compelled her reluctantly to do so, which was well known to her said husband.

She alleges also that the statement in the said indenture of mortgage to the effect that "it is understood that the money to secure the payment of which this mortgage is given was borrowed by the grantors from the grantees to pay for improvements on a part of the mortgaged premises." was inserted or caused and procured to be inserted in said indenture of mortgage by the mortgagees, with the intention of investing said mortgage with the superior force of a lien under the exceptions mentioned in the constitution of this State in regard to homestead exemptions, and of defeating the assertion of the homestead right, when in truth and in fact none of said money was intended for or used in paying for improvements made on any part of the said homestead premises.

The complainant set down the plea for argument, and

upon hearing it was overruled. There had been a replication filed. The replication was withdrawn and the cause set down for hearing upon bill and answer. Upon the hearing the court decreed a sale of the mortgaged premises. This appeal is from that decree.

When there is a plea and an answer in support thereof, and a hearing is had without replication, the rule is that every fact stated in the bill and not denied by the averments in the plea, or by the answer in support of the plea, must be taken as true. (2 Sch. & Lef., 726; 4 Paige, 195; 2 Atk., 241; Gilb. Cas. in Equity, 185; 1 Sim. & Stewart, 568; Mit. Chy. Pldg., 299; 14 Pet., 257.) The matter of the plea is that the mortgagors had a homestead in the mortgaged premises, and the answer in support of the plea denies the allegations in the bill to the effect that the moneys secured by the mortgage were for the payment of obligations contracted for the erection of improvements thereon, and a denial of its voluntary execution. The practice adopted here was incorrect. The hearing first upon the plea, distinct from the answer in support thereof, and afterwards upon the bill and answer apart from the plea, was erroneous. The answer here was strictly and wholly in support of the plea. It denied such allegations in the bill as were supposed to avoid the anticipated plea, such as consent to sale and the use of the moneys in improving the homestead property. It is true that the defendant files the answer as an answer "to the residue of the bill of complaint not covered by her plea." Upon examination, however, it is plain that it is simply in support of the plea. (1 Story, 212; Story's Eq. Pldg., 764.) The plea is to the whole of the bill. There is no "residue of the bill not covered by it."

The rule by which to determine the sufficiency of an answer in such a case as this is to consider every allegation in the bill as true, which is not sufficiently denied by the an-

swer. (2 Sch. & Lef., 726; 4 Paige, 178; 2 Sand. Sup. Ct., 540.) An answer in support of a plea cannot be regarded (as was here done) as a defence independent of the plea. (6 Ves., 597.) It is to be treated as a part of the plea. Such is the form of judgment in such a case. (14 Pet., 281.) The answer here considered separate and apart from the plea, does not propose to set up the full defence of homestead, and in disposing of the case by a hearing upon the bill and answer alone, the matter of the plea not being considered, the defendant was at a disadvantage not sanctioned by any rule of practice. The same was the case when the plea was considered without reference to the answer. We cannot do otherwise than remand the case for proper proceedings. The final decree and the order overruling the plea are reversed, and the case is remanded to stand for hearing upon the plea and answer in support thereof, and for such further proceedings as are conformable to the principles and rules of equity and consistent with this opinion.

KEYSER, JUDAH & CO., APPELLANTS, VS. B. F. SIMMONS, ET ALS., APPELLEES.

1. **Where A. attends conferences of creditors as to the general settlement of the estate of an insolvent debtor, and during this period collects an asset of the insolvent under directions from him to hold the proceeds until settlement with creditors, and afterwards, at a final conference of creditors, resulting in a general assignment, he signs a statement admitting the claim so collected to be an asset of the insolvent, he is estopped from afterwards denying that fact and setting up his own claim as a set-off.**

2. **The recital in a bill brought by an assignee to recover assets which passed under the assignment, that he is also a creditor of the insolvent debtor, does not render the bill multifarious.**

Appeal from the Circuit Court for Escambia county.

C. L. LeBaron & Son were the insolvent debtors mentioned in the opinion. They made an assignment of their effects to the complainants, B. F. Simmons, *et als.* The other facts of the case are stated in the opinion of the court.

J. C. Avery for Appellants.

I. Upon their bill appellees are not entitled to a decree. They sue (1) as creditors and (2) as assignees of C.L.LeBaron & Son.

1st. As creditors: They claim that they are the beneficiaries of a trust created by C. L. LeBaron & Son, in appellants, by a transfer made December 26th, 1874, of the fund in dispute, and that as such they are entitled to a decree.

But the bill alleges that, afterwards, on the 23d of January, 1875, C. L. LeBaron & Son did assign the very same fund to other persons in trust.

Now if the last-alleged trust was created, the first could not have been, because a trust once declared and accepted cannot be revoked. Hill on Trustees, 126, 7 & 8, 351; Burrill on Assignments, 325; 1 Wms. Extrs., 526; 2 ibid, 843.

But appellees say in their bill that this last-alleged trust was created—a positive allegation to be taken as true against them. 1 Danl. Chanc. Prac., 838.

It therefore follows inevitably that the alleged trust of December 26th, 1874, was not created, and that appellees, as beneficiaries of such trust, cannot succeed—whether mediately or immediately.

2d. As assignees: Appellees claim that as assignees of C. L LeBaron & Son, they are entitled to a decree.

To sustain this claim, they allege that on the 23d of January, 1875, C. L. LeBaron & Son assigned the fund sued for to them.

But C. L. LeBaron & Son could not have passed anything by the assignment without some title, legal or equitable.

Now the bill alleges that before this, on the 26th of December, 1874, LeBaron & Son had transferred the same fund in trust to other parties. The legal title then vested in the trustees and the equitable in the *cestuis que trust*, leaving none in the assignors.

Hence, as assignees under the assignment of January 23d, 1875, appellees acquired nothing, and cannot succeed.

If LeBaron & Son did have any title to assign, then the money was held by appellants for LeBaron & Son, and appellees, as assignees, took subject to appellants' equities against LeBaron & Son. Burrill on Assignments, 438; 2 Story's Eq., §1,038.

That these objections may be raised at the final hearing, there seems to be no doubt. Story's Eq. Pl., §283; Davies vs. Quarterman, 4 Younge & Coll., 257; 1 Danl. Ch. Pr., 542-3.

Where property may be made the subject of a legal transfer—as in case of bills of exchange, promissory notes, &c.—an assignment will operate to vest the legal ownership in the trustees. 1 Wms. Extrs., 526; Hill on Trustees, 351; Story's Eq., §591.

II. It follows that the bill is multifarious.

The interest of the creditors and that of the assignees are not common.

They assert distinct and several claims against the same defendants.

The bill is therefore multifarious, because of the improper joinder of plaintiffs, claiming no common interest. Story's Eq. Pl., §279.

III. The bill is not sustained by the evidence.

1st. The bill charges that appellants were LeBaron & Son's most trusted advisers; and on account of their high

standing in the community they were permitted to and did take a leading part in efforts made to bring about a settlement.

(*a.*) Admitting the charge, it is inconceivable that appellants should for that reason be precluded from taking measures for their protection which other creditors might have taken.

Creditors are not bound by an intention to assign. They are not bound, and may secure a lien by attachment at any time before the assignment is actually accepted by the assignees. Burrill on Assignments, 318-322.

There is nothing shown sufficient to abridge appellants' rights in this regard, more than those of other creditors, before assignment made and accepted.

(*b.*) But the answer denies that appellants enjoyed the prominence the bill awards them.

The witnesses for appellants all sustain the answer in this regard; while the witnesses for appellees, upon examination, were forced to admit that appellants' prominence was passive in its nature, arising from the amount of their debt and integrity of their character.

2d. The bill alleges that at the first meeting called by LeBaron & Son, they proffered to turn over all of their assets for the benefit of all their creditors, and that appellants assented thereto.

The answer denies this, and there is no evidence to sustain charge.

LeBaron in his testimony says the meeting was simply "to express my situation and know their views."

3d. The bill charges and the answer denies that the $1,500 was placed with appellants in trust for the creditors.

The only evidence upon this point is the letter of LeBaron & Son to appellants.

LeBaron in his testimony says it was also verbally under-

stood; but Judah in his testimony denies this, saying the letter was all appellants had in relation to the fund.

'Tis true the bill charges and the answer admits appellants' silent acquiescence when, at the last meeting of creditors, a statement was read, embracing this $1,500 in LeBaron & Son's general assets, and appellants making no claim of right to hold the same. But in view of the circumstances, appellants silence cannot be construed as confessing the trust now sought to be fastened on them. It must be considered that this meeting and statement were both in connection with a proposed settlement with the creditors which had been in contemplation for more than a month, and which was to be carried out only in case of acceptance by all. With this understanding appellants signed. The arrangement failed, and LeBaron & Son made another and different assignment, without reference to agreement with creditors, under which appellees act.

Appellants then stood in the same position as before signing the statement.

It is in evidence that this proposed assignment made reservation in favor of the debtors; that alone vitiated the whole proceeding. Burrill on Assignment, 168, and authorities there cited.

We are thrown back then to the letter which accompanied the bill of exchange to ascertain in what capacity appellants received the $1,500.

Appellants are instructed to "collect for account of whom it may concern."

(*a.*) LeBaron & Son may have intended the collection for the benefit of all their creditors, but appellants are not charged with a knowledge of that intention, unless it was communicated, which is denied.

That LeBaron & Son did not intend to create such a trust as described, is evident from the fact they afterwards assigned the fund to other parties, and still later gave a

written order upon appellants for it, thus showing it was not their intention to part with control over it.

This reservation of control by the assignors is fatal to the trust sought to be established. (See the authorities cited above.) Drake on Attachment, §525; 1 Wms. Extrs., 526; 2 ibid., 848; Baker vs. Moody, 1 Ala., 315; Clark vs. Cilley, 36 ibid., 652; 18 Mo., 281.

(*b.*) In order to fasten a trust on property of any description the subject matter and the person who is to receive the beneficial interest must be clearly pointed out. 2 Story's Eq. Jr. §979, a; Hill on Trustees, 91, 164, 173-5, and authorities there cited.

Here no effort is made to point out the beneficiaries of the deposit, and a resulting trust should be decreed. (Same authorities.)

(*c.*) There is nothing in the letter to evidence an intention to create such a trust as is charged. To succeed appellees must establish, not another, but the same trust. 1 Danl. Ch. P., 856 and 860.

(*d.*) Were appellants not creditors, and had they received the money under the same instructions, and a creditor of C. L. LeBaron & Son had garnisheed appellants, what must have been their answer? They must have admitted indebtedness. Who is there that could successfully have interposed a claim to the money based on the letter in evidence? No one. Drake on Attachment, §525.

4th. The general assignment is charged and admitted. The testimony of nearly all, if not all, of the witnesses shows that the first assignment and arrangement sought to be made by and between the creditors failed, and was by mutual consent abandoned.

LeBaron & Son had a right to make the assignment that they did finally make to appellees. But the assignees took subject to all liens and equities which had previously

attached. Burrill on Assignments, 438; 2 Story's Eq. Jr., §1038.

5th. The bill charges, and the answer denies, that appellants promised appellees to pay the money over to them as assignees when required.

(*a.*) There is no consideration for such a promise.

(*b.*) The charge is not sustained by the positive testimony of two witnesses.

In relation to the entire testimony of the three appellees, it should be remembered that they are co-complainants in the cause, and though competent witnesses for themselves, their oaths should not be considered as disparaging responsive denials of the answer, unless they seem to the court entitled to the weight of the oaths of two credible witnesses. 1 Danl. Ch. Pr., 845, n; Vandergrift vs. Herbert, 3 C. E. Green, (N. J.,) 466.

E. A. Perry for Appellees.

C. L. LeBaron & Son, late bankers, brokers, &c., being unable to meet all their liabilities, on the 15th day of December, 1874, suspended business, so informed their creditors, and on that day invited some of their principal creditors, and especially the appellants, to a conference, at which they proffered a surrender of all their assets for the benefit of all their creditors. Subsequent meetings of the creditors were held, at all of which the appellants actively participated: and one of the appellants was appointed by creditors on a committee to examine the books and affairs of the insolvents, and report for the information of the creditors generally.

After the proffer of surrender of assets, and pending the proceedings prior to the actual assignment, a certain bill on New York, part of said assets, falling due, LeBaron & Son, with a view to protect the assets and carry out in good faith

their offer and agreement, to and with their creditors, handed the bill to appellants in trust to collect and the proceeds to hold for the benefit of all the creditors, pending the steps then in progress for carrying out their offer to surrender and assign over their assets to their creditors. This purpose in giving appellants said bill is evidenced by the following instructions, in writing, given them with the bill:

"PENSACOLA, FLA., December 26, 1874.

"MESSRS. KEYSER, JUDAH & CO:

"Present—Dear Sirs: Hand you to collect for account of whom it may concern assets of C. L. LeBaron & Son—

"Marquis & Co. on Rubina & Co., N. Y., payable on delivering B. L. ship't per Mausita.....$1,500.00

"This is on account of what Marquis & Co. owe us, and it had better be sent on to N. Y. at once. The Mausita will be loaded next week.

"When collected, please order the funds out in currency by express, to be kept by you till our settlement with creditors. Yours truly,

"C. L. LEBARON & SON.

"No entry of the above on our books, and will not be till we have settlement with creditors."

These instructions the appellants, without objection or dissent, proceeded to carry out, and did so far as to collect the bill. And afterwards, at a meeting of creditors and upon a report of the committee, of which one of appellants was an active member, a statement was produced showing the liabilities of the debtors and the assets to be turned over for distribution among all the creditors. The statement exhibited the indebtedness of LeBaron & Son to Keyser, Judah & Co., as $3,295.16, the same as it existed at the time of suspension; and said statement exhibited the $1,500 so collected by appellants as one of the assets to be surrendered and assigned over for the benefit of all the creditors.

The correctness of such statement was assented to by the

creditors present, and particularly by the appellants who indicated such assent to the correctness of the statement as to the indebtedness to themselves, and the $1,500 being an asset to be assigned and used for the benefit of all the creditors, by placing their signatures to the statement. All this was done, the statement read and signatures affixed by appellants in open meeting and in presence of creditors, a majority of all whom were present. Thereupon, after nomination of assignee by appellants, and their election by the creditors, and after preparation of proper deeds, an assignment was made by LeBaron & Son to the appellees of all their assets, including the $1,500 in hands of Keyser, Judah & Co. This $1,500, although for some time they seemed willing to pay it over, and left upon the minds of the assignees the impression that they would pay it when required for distribution, at last, on the 27th of April, 1875, the appellants upon demand refused to pay the assignees, claiming the right to hold it and appropriate it exclusively towards the payment of the indebtedness of C. L. LeBaron & Son to themselves, well knowing and admitting that a fair and equal distribution of all the assets will pay the creditors only some ten or fifteen per cent. of indebtedness. Upon such refusal the assignees filed their bill of complaint, setting forth substantially the foregoing facts.

Bill filed May 8, 1875. To this bill Keyser, Judah & Co., respondents in the court below, demurred generally. The demurrer was overruled and respondents answered. Complainants replied and proofs being taken, the cause came on for hearing, and the court decreed in favor of complainants for the $1,500, and interest from the date of demand and refusal to pay the amount over, to-wit: from the 27th day of April, 1875. From this decree respondents appeal upon three grounds: 1st, because the bill does not present a case entitling complainants to a decree; 2d, because the bill is

multifarious; 3d, because the bill is not sustained by the evidence.

Appellees contend the bill presents an unusually strong case entitling them to the decree rendered by the court below. In their characters as creditors as well as that of assignees, there was to them an equitable assignment, that is, there was assigned to them a chose in action and a trust. 2 Story Eq., §§1041, 1046.

In view of the admitted facts, and the existence of the bankrupt law, it is clear the only question to be determined by the creditors in their deliberations was, should they accept the voluntary assignment, or should they force a settlement through a bankrupt court. When the statement of liabilities and assets was read to the creditors, had Keyser, Judah & Co. claimed the $1,500 as a payment on account of the indebtedness to them, there was probably not a creditor present who did not know that a bankrupt court would compel the amount to be paid to its assignee for general distribution. And had Keyser, Judah & Co. then claimed the $1,500, is there any doubt but the insolvent firm's affairs would have been settled in a bankrupt court?

Are the appellants to be permitted to thus mislead their fellow-creditors? To thus keep their friends, LeBaron & Son, out of the bankrupt court, by admitting the $1,500 a general asset until the time limited by the law for forcing them into bankruptcy may have expired, and then turn around and claim that $1,500 as their own?

Was there ever a clearer case of estoppel?

As to the second ground of appeal:

The appellees are unable to foresee in what particular the appellants hold the bill to be multifarious. Certainly all the grounds of the bill "arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end, and one connected story can be told of the whole." Story's Eq. Pl. §271, b.

As to the third ground of appeal:

The bill is surely sustained by the evidence; indeed, it may be said, it is admitted by the answer. The only material allegation of the bill denied by the answer is the allegation that the bill for $1,500 was turned over to appellants in trust. and for the purposes, and to the end that they should, in behalf of all the creditors, collect the same and keep in trust for said creditors.

And this denial being accompanied by the written instructions, with which the bill was given to, and under which it was received by appellants, amounts to a denial of the law simply. Adams vs. Adams, 21 Wal., 185.

Without evidence beyond the answer, the decree is sustained.

In addition to admissions in answer, appellant, Judah, in answer to the 5th interrogatory, says: "It was the intention of our firm to pay over the proceeds of the draft collected for the general benefit of the creditors; but after a number of them (the creditors) refused to sign the proposed agreement, at a meeting called for the purpose, we decided to withhold it."

Does it anywhere appear that the appellants, at that meeting, made known their change of intention to the other creditors, so as to enable the other creditors to refuse the voluntary assignment, and demand instead a settlement in bankruptcy? The fact that the assignment was made, that the firm was not put in bankruptcy, and that no creditor has subjected any of the assets to his own exclusive use, shows conclusively that the creditor acquiesced in the plan for distribution by voluntary assignment, rather than through the bankrupt court. And the inference is irresistible that appellant's actions at the meetings aided no little in bringing about such acquiescence.

Can a party come before a court of equity in the face of this court's opinion in Strong vs. Willis et al., 3 Fla., 124,

and claim that he may one day be a trustee, and on the next assail the trust and subject the trust property to the payment of a debt due himself?

The decree should be sustained with costs, and damages should be allowed the appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

It appears in this case that the insolvent debtors, on the 15th of December, A. D. 1874, suspended business and had a meeting of their principal creditors, among whom were the defendants, Keyser, Judah & Co. The defendants admit that at said conference they were present, and that they, with the other creditors present, had a general consultation "as to what steps should be taken." The plaintiffs allege that at said conference the insolvent debtors proffered to turn over for the benefit of all the creditors all their assets, to which the creditors, including defendants, assented. They then state that after frequent conferences were held upon the basis of this understanding, and on the 26th of December, A. D. 1874, a certain bill, a part of the assets of the insolvent debtors, being due and collectable in the city of New York, in pursuance of the understanding recited, was delivered to the defendants in trust that said defendants for and in behalf of all the creditors should at once send the same to New York for collection, and when collected should order the funds sent back to be retained by them in trust to be applied to the creditors; that said defendants collected said bill and now hold the proceeds.

That at a meeting of the creditors on the 23d of January, 1875, called for the purpose of indicating proper parties to act as assignees, the defendants being present, they, the plaintiffs, were elected such assignees. That at said meeting a statement of the assets and liabilities was read; that such statement of assets included the bill collected by de-

fendants amounting to $1,500,as well as set forth the amount of indebtedness of the insolvents to the defendants $3,295.16, and that the defendants signified assent to such statement by signing the same, and made no claim that the $1,500 was their exclusive property. Thereupon the insolvent debtors made a general assignment, naming plaintiffs the assignees. That defendants, when subsequently called upon, refused to deliver said $1,500, and now claim to set off against it their debt of $3,295.16. The defendants admit that they attended the first meeting, but allege that it was well understood that any party was to be free "to reject any plan of settlement fixed upon to be submitted to the creditors at a future meeting, and that the same understanding existed as to attendance upon all subsequent meetings until a final acceptance of some definite plan, and that *before the said day of assignment* they never accepted any plan of settlement."

They acknowledge the receipt of the bill for $1,500 for collection, but deny that they were to hold the moneys in trust for the creditors. The defendants in their answer, relating what occurred at the meeting at which the plaintiffs were elected assignees, admit "that at a meeting of the creditors on or about the 23d day of January, A. D. 1875, called for the purpose of indicating proper parties as assignees, the said defendants being present, nominated parties to act as such assignees, which resulted in the election of complainants, and that at said meeting a statement of the assets and liabilities was read, and said statement included the said fifteen hundred dollars then in the hands of defendants, and set forth the amount of said C. L. LeBaron & Son's indebtedness to these defendants, to wit: $3,295.16, and defendants being present did not object to the same, and placed defendants' signature against the statement of said indebtedness to said defendants, and made no claim at the time that the said fifteen hundred dollars was not gen-

eral assets, as set forth in said statement and held by them in trust for all the creditors, and properly included in the schedule to be assigned to complainants."

The defendants in their answer also admit that the bill which they collected pending the conferences as to an assignment was transmitted to them by the insolvents in the following letter:

"PENSACOLA, FLA., December 26, 1874.

"MESSRS. KEYSER, JUDAH & CO.:

"*Present—Dear Sirs:* Hand you to collect for account of whom it may concern assets of C. L. LeBaron & Son—

"Marquis & Co. on Rubina & Co., N. Y., payable on delivery B. L. shp't per Mausita.....$1,500.00

"This is on acount of what Marquis & Co. owe us, and it better be sent on to N. Y. at once. The Mausita will be loaded next week.

"When collected, please order the funds out in currency by express, to be kept by you till our settlement with creditors. Yours truly,

"C. L. LEBARON & SON.

"No entry of the above on our books, and will not be till we have settlement with creditors."

These instructions the appellants, without objection or dissent, proceeded to carry out, and did so far as to collect the bill.

There was a replication to this answer, proofs, hearing, and decree for the sum of $1,500 and interest. It is unnecessary to state here the proofs. The clear admissions contained in the answer dispose of the case.

The first proposition made by appellants here is based upon the idea that the bill alleges that there was an assignment made on the 26th December, 1874. The bill alleges that there was a meeting of creditors at that time to consider "what steps should be taken" in the interest of all the creditors, and the answer admits that the meeting was had

to determine what was best to be done in the premises. The only assignment set up in the bill is that of 23d January, 1875, and the defendants admit that they assented to it.

So far as the letter of the insolvents enclosing the bill to defendants is concerned, its effect, according to its plain terms, was to give the defendants the right to hold and have the possession of the funds until a settlement with their creditors. This assignment, with the approbation of defendants, was made for that purpose, and in view of the surrounding circumstances it was the time at which the right of the defendants to hold the money terminated. It makes no difference whether this is called a trust or a bailment. It is unnecessary to enter into the discussion of these questions. We find the defendants attending the conference as creditors before this letter was written, taking an active part as to the matter of a general assignment, and collecting this bill under express directions looking to carrying out this general settlement. In addition to this, at the time the general assignment was made, they expressly admitted and affirmed that they held this bill as an asset of the firm. They are now estopped from alleging that to be false which they then under their hand admitted to be true. The court properly treated this money as an asset of the firm.

There is nothing in the objection to the bill in this case on the ground of multifariousness. The bill is brought by the assignees of an insolvent debtor to recover what is alleged to be an asset of such debtor for which the defendants are liable. The plaintiffs, it is true, allege that they are creditors as well as assignees of the insolvent debtor, but looking to the prayer of the bill and its general structure, it is apparent that the entire right and equity which they seek to assert is founded in their powers under the assignment, and that the allegation that they are creditors is simply by way of recital of their full relations to the insolvent as well as to the defendants, there being no legal objection to the

union of the two relations of creditor and assignee in the same persons.

The decree is affirmed.

EX-PARTE WILLIAM HARFOURD.

1. Where it appears that a committing magistrate, on complaint that the accused had threatened to do damage to a schooner, and also to do bodily harm to the complainant, issued a warrant of commitment to the jail for want of sureties against doing damage to the property and to keep the peace toward the complainant; *held*, that this was erroneous. Sureties of the peace against doing damage to property (except as to threats to burn a dwelling-house) are not authorized by the common law or by statute, and imprisonment for want of such sureties is not allowed by law.

2. The commitment having been made for want of bail for an act not criminal, and also for a criminal act, is irregular. The security should be fixed according to the degree of the criminal act charged, and the court on *habeas corpus* should, if required by the accused, hear and examine into the evidence for the purpose of determining what criminal act has been committed, and the probable cause shown against the accused, and this, whether the warrant of commitment was regular or irregular.

Writ of error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

Wm. Kirke and *D. S. Walker* for Plaintiff in Error.

The Attorney-General for the State.

THE CHIEF-JUSTICE delivered the opinion of the court.

Wm. Harfourd was arrested on the complaint of his wife, charged with having gone on board the schooner Minnie and destroyed various articles; and that he threatens to do

other damage to the schooner, which is in her custody as guardian, &c. And charged further with having within the past two months threatened to do bodily harm to the complainant, and thereupon prayed sureties of the peace against Harfourd.

Upon this complaint the county judge of Escambia county issued his warrant. Harfourd was arrested, witnesses were examined, and Harfourd was found guilty and required to give security in the sum of six hundred dollars "to keep the peace toward all the people of the State of Florida, and particularly towards the said Elizabeth Harfourd, of said county, and should refrain from doing any injury to the schooner Minnie, or anything appertaining to said schooner, for the space of twelve months." And such security not being given, defendant was committed to jail, to be there kept "until he should find such security, or be thence discharged by due course of law."

Harfourd then obtained a writ of *habeas corpus* from the Circuit Judge, directed to the sheriff, who made return that he held petitioner by virtue of the commitment referred to, which recited the proceedings and finding above quoted.

The return was excepted to as insufficient in that the commitment did not specifically set forth the charge upon which accused was arrested and tried; that it couples a legal offence with one unknown to the law, and that the security required to be given is not in accordance with the law, and petitioner moved to quash the commitment and for a discharge.

The Judge denied the motion, whereupon the petitioner asked leave to present to him the proceedings and testimony taken in writing before the county judge, and that he might introduce other witnesses and testimony, "and for plea to the return says" that there was not any legal evidence before the county judge to warrant the finding or commitment; that it will appear from evidence before the county judge

that all the threats of violence, if any, related to property and not to the person; that it will appear from the evidence before the county judge that for the preceding two months the prosecuting witness, who is the wife of petitioner, lived with him without fear of bodily harm and peaceably, and that no quarrel, altercations or threats took place on or about the time she had the accused arrested; and that it would further appear that the arrest was made solely that she might in her own way control the working and profits of the schooner Minnie.

The Circuit Judge then makes this entry in the record: "Upon delivering my opinion adverse to the application of the relator on the proceedings and papers prior to the foregoing, the counsel asked leave to present the same and moved that action be taken thereon; whereupon, considering matters already disposed of as the law required, I refused to take further steps, and made the order which follows, to which relator's counsel excepted." Then follows an order that the complaint of the relator is not sustained, and he was "remanded to the custody of the sheriff under the commitment aforesaid."

The minutes of the proceeding and judgment being duly filed and entered of record, the petitioner obtained a writ of error.

The errors assigned are, first, overruling the motion to quash the commitment and discharge the prisoner; second, in refusing to "inquire into the cause of his imprisonment," to grant a re-hearing upon the petition; and, third, in remanding the prisoner to the custody of the sheriff.

The complaint and commitment in this case show that the causes alleged for the arrest and imprisonment were threats to do damage to property and threats to do bodily harm. It is objected that this couples two offences in the same charge, which should not be united, as a party should not be put to trial on two distinct offences stated in the

same charge. It is no fault in an indictment that several offences of the same grade be joined in one indictment. Every indictment containing more than one count charges in the law as many offences as there may be counts contained in it.

The objection, however, that the charge embraces threats to injure property and to do bodily harm, and that it does not appear whether the amount of bail was fixed with reference to the former or the latter, presents a different question. Sureties of the peace in general are required for the protection of person and not of property. We have found but one reference in the books to the case of threatened damage to property. "Wherever any private man hath just cause to fear that another will *burn his house*, or do him a corporal injury by killing, imprisoning or beaten him, or that he will procure others to do so, he may demand surety of the peace against such person." 1 Hawk. P. C., c. 60. "Surety of the peace may be demanded by a wife if her husband gives her unreasonable correction. Surety of the peace ought not to be granted to a man for fear of danger to his servant or cattle. It hath, however, been said that a man may have the surety of the peace against one who threatens to hurt his wife or child." See authorities cited in 3 Tomlin's Law Dict., Tit: Surety of the Peace.

It thus seems that except in the case of threatening to burn the house of the complaining witness, which is in its character a threat against personal security, the rule at the common law is that the threat for which sureties may be exacted are those that refer to injuries to the person of the complainant and his family. The ordinary civil and criminal proceedings for injuries to property are deemed adequate for its protection. In the present case the petitioner is imprisoned because he does not give security that he will not do "injury to the schooner Minnie or anything appertaining to her." In our judgment this is not a lawful cause of im-

prisonment, and the Circuit Court erred in refusing either to discharge or to inquire into the merits of the charge as to the threats of personal injury.

In England, it is said that "even though the commitment be regular, the court will examine the proceedings, and if the evidence appear altogether insufficient, will admit the prisoner to bail; for the court will rather look to the depositions which contain the evidence than to the commitment, in which the justice may have come to a false conclusion." Hurd Hab. Corp., 427.

"Ordinarily, if the warrant be found invalid for the want of essential requisites or conditions, the prisoner will be entitled to be discharged. But this is not an invariable rule even where there is no statute to direct the action of the court or judge under the writ. Where the proofs upon which the committing magistrate acted have been certified up or otherwise properly presented to the court or officer hearing the *habeas corpus,* or the further proofs which may be adduced at the hearing where such further proofs are permitted, create a reasonable ground of suspicion of the prisoner's guilt of the crime specified, or any other, it has been held to be the duty of such court or officer, if invested with the power of a committing magistrate, not to discharge the prisoner absolutely, however defective the warrant may be, but to remand or commit him *de novo.*" Hurd on Hab. Corp., Book II, Chap. 7, Sec. 11, and the large collection of authorities cited.

In this State, the Circuit Judges are invested with the authority of committing magistrates, and the statutes relating to *habeas corpus* give ample power to examine into the cause of the imprisonment, and to discharge, admit to bail or remand to custody, "as the law and the evidence shall require."

The judgment of the Circuit Court is reversed. The

cause is remanded with direction that further proceedings be had according to law.

DAVID HAMILTON, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

In an indictment for procuring property by false pretences, it is not sufficient to charge that the prisoner "designedly, and by a false pretence, and with intent to defraud one A. P., did obtain with such intent the following property." It must charge what that pretence was, and allege specifically that it was false.

Error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

H. A. Pattison for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an indictment for procuring property by false pretences, under section 20, chapter 4, of the act entitled "an act to provide for the punishment of crimes and proceedinge in criminal cases," approved August 6th, 1868. The section reads as follows: "Whoever designedly by a false pretence, or by a privy or false token, and with intent to defraud, obtains from another person any property, or obtains with such intent the signature of any person to a written instrument, the false making whereof would be punishable as forgery, shall be punished by imprisonment in the State penitentiary not exceeding ten

years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year; but the provisions of this section shall not apply to any purchase of property by means of a false pretence relating to the purchaser's means or ability to pay, when, by the terms of the purchase, payment for the same is not to be made upon or before the delivery of the property purchased, unless such pretence is made in writing and signed by the party to be charged."

Before this cause came on for trial, the counsel for the prisoner moved the court to quash the indictment for the reason that it does not allege and state what the false pretences were upon which the property was obtained. This motion was overruled by the court. A subsequent motion was then made on behalf of the prisoner to compel the State's solicitor to amend the indictment, so that it should contain an averment that the false pretence was reduced to writing and signed by the accused, or otherwise, according to the meaning of the statute. This motion was also denied by the court, and the prisoner was then tried by a jury and found guilty, whereupon counsel for the prisoner made a motion in arrest of judgment, for the reasons before stated. The court refused such motion, and sentenced the prisoner to five years' confinement in the State prison, at hard labor, and to pay the costs of the suit to be taxed.

The case is here by writ of error brought by the prisoner, David Hamilton.

The indictment upon which he was tried and convicted reads as follows:

"The grand jurors for the State of Florida, duly empaneled and sworn diligently to inquire, and due presentment make, in and for the body of the county of Duval, upon their oaths do present, that David Hamilton, late of said county of Duval, laborer, on the 5th day of May, A. D. 1877, in the county and State aforesaid, designedly, and by

a false pretence, and with intent to defraud one Alexander K. Percival, then and there being, did obtain, with such intent, the following property, to-wit: two pairs of shoes of the value of seven dollars and fifty cents, of the goods and chattels of the said Alexander K. Percival, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Florida."

This indictment is bad, and should have been quashed on the motion made for that purpose. It states simply a conclusion of law, that Hamilton had obtained two pairs of shoes from Percival by a false pretence. What was that pretence, and was it false? Whatever it may have been, it should have been set out in the indictment with clearness and certainty, and the pretences should have been specifically negatived. The term "false pretence" is said to be of extensive meaning, and could be made to cover almost any false statement made by one party in obtaining goods or property from another. Yet such statements may not amount to a criminal offence. A lie might easily be construed into a false pretence, yet, however great the moral turpitude of the man who utters it, it would hardly do to punish the offender in every case by years of imprisonment in the penitentiary. A common pleading at law to recover the value of the property would have been more certain and satisfactory than this indictment for an offence which might involve the liberty of the prisoner for the term of ten years. An indictment should be more certain than a pleading at law, for the reason that it is penal, and is to be answered with more precision. The prisoner must be informed what pretences he is called upon to answer, and he cannot be put upon his trial until he is made acquainted with the specific charges against him.

It is therefore not sufficient to aver that the offence was effected by a false pretence. The indictment must show what that false pretence was, and those pretences must be

specifically negatived. See Wharton Crim. Law, §§2148, 2158; 1 Hawkins P. C., 323; Rex vs. Mason, 2 Term R.,581, and cases cited; People vs. Haynes, 11 Wend., 557; State vs. Locke, 35 Ind., 419; State vs. Webb, 26 Iowa, 262.

The judgment must be reversed, and an order will be entered that the indictment be quashed and the prisoner discharged, unless he is held by some other legal process.

THOMAS GIBSON, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The act of the Legislature of A. D. 1877, chapter 3010, entitled "an act to amend section 3, chapter 1628, Laws of Florida, relating to jurors, and repeal chapter 2043, Laws of Florida, approved February 20, 1875," not only amends and repeals the particular sections specified, but makes further provisions upon matters properly connected with the subject of the acts affected by the amendment and repeal; *Held*, That the subject of the act being expressed in the title of the amending act, the Legislature was not restricted by the constitution to the mere amendment or repeal so expressed, and it was competent to include in the act other provisions of law upon the same subject and properly connected therewith.

2. An act providing that juries, to be empaneled for the trial of causes, civil or criminal, should be composed of six men, is authorized by the constitution as amended in 1875.

Writ of error to the Circuit Court for Jefferson county.

The plaintiff in error was convicted of larceny at the regular spring term of the Circuit Court for Jefferson county, held in March, 1877. Afterwards he entered a motion in arrest of judgment upon the grounds:

1st. That "the court erred in not allowing the jury to stand as drawn in January."

2d. "The law declaring null and void the drawn venire of such jury is unconstitututional."

3d. "The record does not disclose that the prisoner was tried by a jury of six, taken from a regular panel of eighteen, as required by law;" and,

4th. "That the grand jury by which he was indicted was illegal."

The court overruled the motion, and the prisoner excepted to the ruling.

Section 3 of Chapter 1628 of the Laws of Florida, entitled "an act relating to jurors," approved August 1, 1868, was prior to the passage of Chapter 3010, in 1877, as follows:

"The board of county commissioners, at a meeting to be held the first week in September for the year 1868, and at a meeting to be held the first week in January of each year thereafter, shall select from the list of registered voters in their respective counties, and make out a list of three hundred persons properly qualified to serve as jurors, who shall be such persons only as they know, or have good reasons to believe, are of approved integrity, fair character, sound judgment and intelligence, which list, certified and signed by the chairman of the board, shall be forthwith delivered to the clerk, and by him recorded in the minutes; *Provided*, That if in any of the counties in this State the county commissioners shall not be able to select the number required by this section, they shall be authorized to select a less number, and [the] highest possible; and in such case grand jurors shall not be exempt from serving on petit juries at the same time."

Chapter 2043, entitled "an act to amend section 5, chapter 1628, of Laws of Florida, reducing the number of grand and petit jurors," approved February 20, 1875, is as follows:

"That section 5, chapter 1628, Laws of the State of Florida, be so amended as to read as follows: On receiving such list, the clerk of the Circuit Court shall write the

names of the persons contained therein on separate lists of paper, and shall roll up or fold such pieces of paper so that the name written thereon shall not be visible, and shall deposit such pieces of paper in a box so constructed that it may be tightly closed, and at least thirty days before the sitting of any regular term of the circuit court at which a jury shall be required, the clerk of said court, in the presence of a sheriff or deputy sheriff, and the county judge, or, in his absence, a justice of the peace of the county, shall proceed to draw from the box the names of not less than twelve nor more than fifteen persons to serve as grand jurors at such court; and in counties having over one thousand registered voters the names of twenty-four persons, and in counties containing less than one thousand registered voters the names of twelve persons, to serve as petit jurors at such court of the respective counties."

This act is repealed by Chapter 3010.

Section 5 of Chapter 1628 provided for drawing not less than eighteen nor more than twenty-three persons to serve as grand jurors, and thirty-six persons to serve as petit jurors.

Section 1 of Chapter 2046, approved February 20, 1875, entitled "an act in relation to jurors of the Circuit Court," under which the judge ordered the grand and petit jurors to be summoned at the commencement of the term, as stated in the opinion, is as follows:

"That whenever, for any cause, no grand or petit jurors have been drawn and summoned in the manner provided by law for any regular terms of the circuit courts of this State, it shall be lawful for said courts, or the judges thereof, to order the clerks of said courts to issue special venires for a sufficient number of such jurors for said terms, to be directed to the sheriff or coroner of the county, and in case there be no sheriff or coroner in the county, then to an elisor, to be appointed for that purpose by the court or judge, commanding them to summon from by-standers, or the body of the county at large, the number of the qualified jurors so ordered."

Chapter 3010, approved February 17, 1877, is as follows:

An act to amend Section 3, Chapter 1628, Laws of Florida, relating to Jurors, and repeal Chapter 2043, Laws of Florida, approved February 20, 1875.

The People of the State of Florida, represented in Senate and Assembly, do enact as follows: SECTION 1. That Section 3 of Chapter 1,628, of the Laws of Florida, be amended so as to read as follows: The Board of county commissioners, at a meeting to be held the first week in February, 1877, or as soon thereafter as practicable, and at a meeting to be held the first week in January of each year thereafter, shall select from the list of registered voters in their respective counties and make out a list of three hundred persons, properly qualified, to serve as jurors, who shall be such persons only as they know, or have good reason to believe, are of approved integrity, fair character, sound judgment and intelligence; which list, certified and signed by the chairman of the board, shall be forthwith delivered to the clerk, and by him recorded in the minutes; *Provided,* That if in any of the counties in this State the county commissioners shall not be able to select the number required by this section, they shall be authorized to select a less number, such number to be the highest possible, and in such case the grand jurors shall not be exempt from serving as petit jurors at the same term; *Provided,* They have not formed or expressed an opinion; *And provided further,* That such service does not interfere with their duties as grand jurors.

SEC. 2. That selections of jurors made during January, 1877, are hereby declared to be null and void.

SEC. 3. That on receiving such list the clerk of the Circuit Court shall write the names of the persons contained therein on separate pieces of paper, and shall roll up or fold such pieces of paper so that the name written thereon shall not be visible, and shall deposit such pieces of paper in a box so constructed that it may be tightly closed; and at least fifteen days before the sitting of any regular term of the Circuit Court at which a jury shall be required, the clerk of the court, in the presence of the sheriff or deputy sheriff, and the county judge, or in his absence a justice of the peace of the county, shall proceed to draw from the box the names of not less than fifteen, nor more than eighteen,

persons to serve as grand jurors at such court; and in counties containing less than one thousand registered voters, the names of twelves persons to serve as petit jurors,and in counties having over one thousand registered voters, the names of eighteen persons, to serve for the first week of the court, and in counties where the court is continued and held for more than one week, the judge shall order the names of eighteen persons to be drawn each week to serve as jurors for the succeeding week, as long as said court shall continue in session; *Provided*, The judge shall have the power to hold any juror over beyond the end of the week for which he was drawn, if such juror be engaged in the trial of a case in which no verdict has been rendered. No person shall be drawn to serve on a grand or petit jury more than once during the same year. That after January 1, 1878, the drawing of said jurors shall be publicly made in the court-house of each county, and the time and place of said drawing shall be advertised ten days before the day of said drawing by written notices, posted at three public places in said county, and the sheriff shall proclaim the meeting and its purposes at the door of said court-house on the day of drawing of said jurors, and all persons under prosecution for a crime shall be disqualified to serve on any jury, grand or petit, and no sheriff or his deputies, assessor of taxes, collector of revenue, county treasurer, county clerk, county judge, county commissioners, justices of the peace, or United States officials, shall be qualified to serve upon a grand or petit jury.

SEC. 4. That Chapter 2043, of the Laws of Florida, reducing the number of grand and petit jurors, approved February 20, 1875, be and the same is hereby repealed.

SEC. 5. From the approval of this act, every grand jury shall consist of not less than fifteen persons, and shall select its own foreman.

SEC. 6. From the approval of this act, twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other offences prosecuted by indictment, presentment, or information, and to try all civil causes within the jurisdiction of the circuit courts of this State.

SEC. 7. In capital cases the prisoner shall have twenty

peremptory challenges and the State five, and in other felonies, not capital, the prisoner shall have five peremptory challenges and the State two; and in misdemeanors the prisoner shall have three peremptory challenges and the State two. And when the nature of any case, civil or criminal, requires that a knowledge of reading, writing, and arithmetic, or either, is necessary to enable a juror to understand the evidence to be offered on the trial, it shall be a cause of challenge if he does not possess such qualification, to be determined by the judge presiding at the trial.

SEC. 8. All laws or parts of laws conflicting with the provisions of this act are hereby repealed.

Section 14 of Article IV. of the Constitution is as follows:

"Each law enacted in the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title, and no law shall be amended or revised by reference to its title only; but in such case, the act as revised, or section as amended, shall be re-enacted and published at length."

The other facts necessary to a full understanding of the case are stated in the opinion of the court.

Wallace & Thompson for Plaintiff in Error.

The Attorney-General for the State.

THE CHIEF JUSTICE delivered the opinion of the court.

The errors assigned are: 1st, that the court erred in not allowing the jury to stand as drawn in January and returned by the sheriff; 2d, in not deciding that the act of 1877, declaring the selection of jurors made during January, 1877, null and void, was unconstitutional; 3d, in not deciding that the grand jury by which the accused was indicted was illegal.

As to the first assignment, the record does not show that a jury had been drawn in January, or that a jury had been summoned by the sheriff previous to the term at which the

indictment was procured. There is an utter absence of any statement in the record from which these facts may be inferred. The motion in arrest of judgment was in part upon the ground that a jury had been drawn in January, and summoned; still the record does not show the fact by any direct or indirect statement. The record does show affirmatively that at the commencement of the term the judge directed grand and petit jurors to be summoned in the mode provided by law. (Chap. 2046, Laws of 1875.) The presumption is that the necessity existed, and that the law was complied with in that respect. There is no error apparent on this ground.

The second and third grounds of error present the question of the validity of the act of 1877, entitled "an act to amend Section 3, Chapter 1628, Laws of Florida, relating to jurors, and repeal Chapter 2043, Laws of Florida, approved February 20, 1875."

The act referred to in this title as Chapter 1628, (laws of 1868,) relates to jurors. The third section, which provided for the selection of lists of persons from which jurors were to be drawn, required the county commissioners to meet in January, annually, and make the selection. The amendment provides that the list should be made in February, 1877, and annually thereafter in January; and section two annuls any selection of jurors made in January last.

Section 3 of this act of 1877 provides a substitute for Chapter 2043, repealed, and directs the drawing and summoning of not less than fifteen or more than eighteen persons for grand jurors. The repealed act limited the number to be drawn for grand jurors to fifteen and not less than twelve. Chapter 2043.

The act of 1877 provides further, (Section 5,) "that every grand jury should consist of not less than fifteen persons;" and (Section 6) "that twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to

try all other offences prosecuted by indictment, presentment or information, and to try all civil cases within the jurisdiction of the Circuit Courts of this State."

The record shows that eighteen persons were summoned to serve as grand jurors; and it further shows that the trial of the accused was by a jury of six persons. This presents the question made by the second and third grounds of error assigned.

It is urged in the first place, that the act of 1877, (Chap. 3010,) by its title, purports to be merely an amendment of Section 3 of Chapter 1628, relating to jurors, and to repeal Chapter 2043, and that under the Constitution of this State any provisions of the act of 1877, beyond the mere purpose expressed in its title, are void. The 14th Section of Article IV., of the Constitution, provides that "each law enacted in the Legislature shall embrace but *one subject* and matter properly connected therewith, which subject shall be briefly expressed in the title," &c.

This act of 1877 clearly, by its title, relates to the "subject" of jurors. Each of the acts affected by it relate to jurors.

The sections to which we have made reference in the act of 1877 refer to the "subject" of jurors, and there is but one subject embraced in their provisions within the terms of the Constitution. The act of 1868 is entitled "an act relating to jurors," and provides who shall be qualified to be jurors, how they may be drawn and selected, the officers designated to draw and select them, the summoning, empaneling, challenging, indictments, practice, and all the variety of matters pertaining to the *subject*. Every section of the act of 1877 refers to the subject of jurors and matters pertaining to juries, and there is no subject embraced in it which is not "matter properly connected therewith." If the language of the Constitution was that each act of the Legislature should be restricted to the accomplishment of

but one *purpose*, there would be more room for question. It might then be said that one purpose to amend one section or act could not be coupled with another purpose, to wit: to repeal another section of the same or another chapter, (though relating to the same subject) because two ends or purposes are sought to be accomplished by one act. But this is not the language or the intention of the Constitution. It would be extremely inconvenient if it were required that each amendment to the laws on the same subject should be incorporated in a separate act, and that several purposes could not be accomplished by one enactment relating to the same general subject.

The Constitution of Michigan contained a similar provision, as did that of Louisiana. The Supreme Court of Louisiana, speaking of the former practice of the Legislature, says: "The title of an act often affords no clue to its contents. Important general principles were found placed in acts, private or local, in their operation; provisions concerning matters of practice or judicial proceedings were sometimes included in the same statute with matters entirely foreign to them, the result of which was that on many important subjects the statute law had become almost unintelligible, as as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation of this chaotic mass was the object of the Constitutional provision under consideration." (Walker vs. Caldwell, 4 La. Ann. R., 298.) Nearly all the States having Constitutions of recent adoption have incorporated therein provisions in nearly identical language, and their courts agree as to the purpose of such provisions. They also agree that the provision refers to the subject-matter of the legislation, and not to a single purpose or end sought to be accomplished. Its purpose was to avoid the confusion incident to the evil which had grown out of "omnibus" legislation. The act in question avoids this evil.

We refer to the commentaries by Mr. Cooley in his Constitutional Limitations, and the authorities cited by him on pp. 141-150, as furnishing a proper interpretation of the provision.

The act of 1877, however unmechanical the title may be, relates to but "one subject and matter properly connected therewith," and this is "briefly expressed in the title." We therefore hold the act not to be in violation of the Constitution.

The only other question raised upon the assignment of errors is, that the section providing that a trial may be had by a jury of six persons is not constitutional. The provision in the bill of rights that "the right of trial by jury shall remain inviolate forever," taken by itself, refers to a jury, according to the common law, to be composed of twelve persons. The amendment to the Constitution, which was adopted in 1875, reads thus: "Grand and petit jurors shall be taken from the registered voters of the respective counties. The number of jurors for the *trial of causes* in any court may be fixed by law."

This amendment is a part of the same Constitution that secures the right of trial by jury, and by all known rules of construction qualifies and controls, without destroying or infringing, the right of trial by a jury. An examination of the legislation shows that the number of jurors has been regulated by law, and that six persons are made sufficient in many of the States under similar constitutional provisions or under statutes, and these regulations have been sustained by the courts.

The provision in our Constitution refers to the number of jurors "for the *trial* of causes," and not merely to the number of persons from whom a jury is drawn. Any other construction would be meaningless. No other object is accomplished by it. Under it a jury composed of six persons is a constitutional jury.

As to the matter raised upon the argument, that the record did not show that the grand jury had been sworn, no question was raised before the Circuit Court upon it, and it was agreed upon this argument that there was an indictment regularly presented by the grand jury. This includes the fact that the jury were sworn, and it is not good practice to spring questions of this character upon the argument in this court, because if it were regularly raised the State would be apprised of the point and have opportunity to supply anything omitted by the clerk in certifying the record.

This matter is covered by the principle decided by this court in Collins vs. The State, 13 Fla., 657-669, and the authorities there cited.

The judgment is affirmed.

DECISIONS

OF THE

Supreme Court of Florida.

JANUARY TERM, A. D. 1878.

THE STATE OF FLORIDA EX REL. SAMUEL Z. GONZALEZ, COLLECTOR OF REVENUE ESCAMBIA COUNTY, PLAINTIFF, VS. COLUMBUS DREW, COMPTROLLER, RESPONDENT.

Under the Statute of this State the Collector of Revenue is paid commissions with reference to amounts collected, under a warrant issued annually by the Assessor of Taxes, which warrant, with the annual assessment roll, is placed in the hands of the Collector. The commissions are fixed by law with reference to the amount of collections made on each revenue account for each year, and not with regard to the sums which may be collected by each officer engaged in such service. In this case no question of juristiction is raised or considered, it being immaterial in view of the conclusion reached.

The relator filed a petition for an alternative writ of mandamus January 15, 1878, and the court ordered that the writ issue in accordance with the prayer of the petition. The alternative writ issued, and the *facts* stated in the petition being admitted as true, and the question of the jurisdiction of the court to control the judgment of the Comptroller in the premises being waived, the case was submitted to the court for a construction of the statute involved. The other facts necessary to a full understanding of the case are stated in the opinion of the court.

E. A. Perry for the Relator.

The Attorney-General for the Comptroller.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The 65th Section of Chapter 1966, Laws, provides that "the collector of revenue shall be entitled to commissions upon the amount of State taxes collected by him as follows: on the first thousand dollars, ten per cent.; on the next thousand dollars, five per cent.; on the next two thousand dollars, three per cent.; on the balance, one per cent. * * The commissions for collecting State taxes shall be audited and allowed by the comptroller, and paid by the Treasurer upon warrant therefor."

The relator, who was appointed collector of revenue for Escambia county on the 3d day of February, A. D. 1877, affirms in his petition that of the State taxes for 1876, he collected and made proper return of more than four thousand dollars, viz: the sum of $17,307.93. On four thousand dollars of this sum he claims commissions at the rate stated in the above section as the commission on the first four thousand dollars. The comptroller declines to pay this sum, as the antecedent collector had collected of revenue for 1876 the sum of $3,998.99, and had received the compensation fixed for that portion of the first $4,000. The question presented is, whether the compensation is fixed with reference to collections upon each annual assessment, or in reference to the entire amount which the officer may collect; and the whole question depends upon the construction of the words "State taxes" in this section. If this term refers to each annual assessment, then the effect is to restrict the commission on the first $4,000 to the first $4,000 of each annual assessment, in contradistinction to the first $4,000 which each officer may collect, and to render it impossible for but one officer to receive this amount of commissions on the annual revenue collected. If the other construction is correct, then the commissions upon the revenue are fixed with reference to the whole amount collected by

the officer during his term. The collection follows a warrant issued annually by the assessor of taxes to the collector. This warrant accompanies the annual assessment book, and for the purpose of this proceeding must be regarded as partaking of the nature of process. Each annual warrant is one process applicable to the entire collections to be made under it. In case of vacancy and reappointment, the new officer but executes the process of his predecessor. The intention of the Legislature was evidently to provide like compensation for the assessor and collector. Under the sixty-fourth section providing for the compensation of the assessor, it is clear that he is paid per the annual assessment. We think the clear intention of the Legislature was to provide compensation with reference to the collections made upon each annual assessment, and that the same rule applies whether one or more officers make the collections. Any other construction would be manifestly unjust to the officers engaged in this duty. If we take an officer whose annual warrant is to collect per thousand dollars, his second year's compensation would be forty dollars. The terms of the law attach the compensation to the office, and the warrant is a process under which the collection is made for each annual assessment. The compensation is fixed with reference to the annual assessment.

All questions as to jurisdiction herein are waived in the record by the respondent.

The peremptory writ is denied.

THE STATE OF FLORIDA EX REL. ATTORNEY-GENERAL, PLAINTIFF, VS. SIMON JONES, RESPONDENT.

1. A pilot is not an officer within the meaning of the Constitution and Statutes of this State; he is a person invested by law with peculiar powers and privileges connected with commerce, for the exercise of which a qualification is required by the State. The privileges and powers which he has, being of a public nature, resulting from legislative grant, are franchises. If he is exercising such franchises without the qualification prescribed by the State, an information in the nature of a *quo warranto* may be brought by the Attorney-General.

2. A plea is a sufficient response to an information in the nature of a *quo warranto*, if it sets up facts showing a right to exercise the office or franchise alleged to have been usurped. Where a statute prescribes a qualification for exercising an office or franchise, the plea need not be framed in the words of the law. It is sufficient if the facts set up show clearly the right.

3. Two years actual service on a pilot-boat on the bar of Pensacola as an able seaman, receiving during that time instructions from pilots relative to the harbor, the bar, depth of water, courses, and the management of vessels, constitutes an apprenticeship within the meaning of the Statutes of this State controlling the subject. An actual binding out is not necessary.

The information in the nature of a *quo warranto* in this case was filed at the June term, A. D. 1876, the Hon. Wm. Archer Cocke being then Attorney-General, and Messrs. Jones and Mallory appearing for the relator. The respondent, Jones, filed both a general demurrer and a plea on the fifth day of August, 1876. The court disposed of the demurrer at the June term, 1877. The other facts necessary to a full understanding of the opinion on the demurrer are stated in the opinion.

Jones and *Mallory* for the Relator.

The position of pilot for any port in this State is, under the laws of Florida, a public office. All pilots in this State

are appointed by virtue of an act of the Legislature; they hold their offices during life and good behavior, have definite duties prescribed, fixed rates of compensation, are required to give bond, and are entitled to do all the business of pilots of the ports for which they have been respectively appointed. They are subject to penalties for misfeasance and malfeasance, and are protected by law in the enjoyment of their offices and emoluments. See Palmer vs. Woodbury, 14 Cal., 45; People vs. Hayes, 7 How. (N. Y.) Pr., 248; Wood's Case, 2 Cow., 29, note; 2 Hill, 196; 11 How. (N. Y.) Pr., 240.

In case of intrusion into or usurpation of such office, under a proceeding of information in nature of a *quo warranto,* to oust it is only necessary to allege such instrusion or usurpation. Such usurpation, if not disproven, is of itself adequate cause for judgment of ouster. In this information usurpation of the office is alleged, and the ground of the allegation is specifically stated as being a failure on the part of respondent, Jones, to comply with the requirement of the 3d Section of Act No. 31, Chapter 1893, Laws of Florida, approved February 27, 1872, in this, that the said Simon Jones had never served a regular apprenticeship for two years on the bar of the port of Pensacola, on any pilot-boat thereon, although for five years previous to his reputed appointment as pilot there had always been at least three regular pilot-boats on the bar of the port of Pensacola.

That it is not in the power of the pilot commissioners to cure a defect of this kind, nor in their discretion to ignore it in making appointments. See Palmer vs. Woodbury, 14 Cal., 45.

These are the essentials to a *quo warranto* proceeding. If they are found in the information, until respondent disproves them, relator's case is sufficiently made out.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an information in the nature of a *quo warranto,* brought by the Attorney-General against the defendant, to show by what authority he exercises the office and franchises of pilot on the bar of the port of Pensacola. The ground upon which a judgment of ouster is sought, as stated in the information, is that at the time the defendant was appointed he did not possess the qualifications prescribed by law for such appointment, in that he had not served a regular apprenticeship of two years on a pilot-boat on said bar. To this information the defendant interposes a general demurrer, at the same time filing a plea. Under the discretion vested in this court (Sec. 34, Chap. 1096, Laws,) we dispose of the demurrer first.

The only question suggested by the brief of the relator as arising upon this demurrer is whether an information in the nature of a *quo warranto* is applicable to such a case? The relator insists that "the position of pilot for any port in this State is a public office;" that to be eligible to such office the person must be qualified as the statute requires, and that in case of ineligibility this is the proper remedy.

Is a pilot an officer? A pilot while engaged in the discharge of his special duty is an officer in the same sense that the master of the vessel is an officer; both are mariners, having, it is true, dissimilar powers. But as to the general nature of their employment, concerning, as it does, primarily the navigation of the ship, the principal difference is the source from which their power and authority is derived. The pilot derives his authority from the law independent of any contract, while the master derives his position through contract, the law attaching to such position certain powers, rights and duties. Whether a pilot is an officer in the sense in which that term is used in the Constitution of this State, is a different question. It is very clear from an examina-

tion of the statutes upon this subject that the legislative department of the government has not so viewed the matter. The Constitution (Sec. 14, Art. XVI.,) provides "that the Legislature shall not create any office the terms of which shall be longer than four years." A pilot is not named in the Constitution; he is a creature of legislative action, and the act regulating pilots and pilotage in this State has no limitation as to the duration of the appointment except good behavior.

The Constitution (Sec. 10, Art. XVI.,) prescribes a particular oath "for each officer in the State;" the Legislature does not require this oath of a pilot.

The Constitution (Sec. 27, Art. IV.,) provides that "the Legislature shall provide for the election by the people, or appointment by the Governor, of all State, county or municipal officers not otherwise provided for by this Constitution." A pilot is neither elected by the people nor appointed by the Governor; he is licensed by the board of commissioners of pilotage.

Section 13, Article V., of the Constitution, requires that "all grants and commissions shall be in the name and under the authority of the State of Florida, sealed by the great seal of the State, signed by the Governor and countersigned by the Secretary of State." A pilot's license or appointment, while it may be in the name of the State, is not required by the Legislature to be sealed, signed and countersigned, as here required.

We cannot presume the Legislature to have been ignorant of *all* these provisions in respect to officers under the Constitution, and it results from the action of this department of the government as to pilots that they were not thought to be embraced in the term officers as used in the Constitution.

Were it our view upon mature reflection, after thorough examination, that the functions and powers performed by

pilots were such as necessarily constituted them officers, then, even though they were only the creatures of legislative action, still they must have been either elected by the people or appointed by the Governor, (Constitution, Sec. 27, Art. IV.,) and the appointment by the board of Commissioners of Pilotage in this case would be without any foundation in law, because in direct conflict with this limitation of the Constitution. It is our opinion, however, that a pilot is not an officer within the meaning of any of these clauses of the Constitution. "By the universal assent of the maritime world, and in all jurisprudence, the master, the mate, and the pilot are placed under the general definition of mariners." (1 Mass., 508; 10 Pet., 108.) This is his general classification. So far, therefore, as the general nature of the duties which he performs are concerned, he is no more an officer of the State government, subject to be called to account for the usurpation of powers, than the master of a vessel is. There is, however, a very material and essential difference as to the source from which they derive their power and the purpose of its exercise. The master as master derives his position and employment from the owner and by contract, like any employe of a merchant or farmer.

The pilot is an instrument of the law, a means created and employed by the sovereign to promote commerce, and to such end is invested with certain power and authority as to navigation. This power and authority is vested in him by the government as a means or method through which its right and duty to prescribe rules of navigation, (one of the essentials to general well regulated commercial intercourse,) is exercised. This power is the result of an exclusive grant to him and his class by the government. A particular method for his appointment is prescribed, qualifications to constitute eligibility to appointment are required, and the amount of the fees and tolls that he may collect for his services is fixed by law, and not by contract. These

powers appertain to the public, affect an interest of great magnitude to all commerce and commercial people, and can exist in the hands of the citizen only by virtue of legislative grant.

While we think it clear that a pilot is not an officer within the meaning of the Constitution, still he is invested with powers and privileges which do not appertain or belong to every citizen. In this country, and under our institutions, such rights, privileges, and powers as these, invested by law in the citizen, being of a public nature appertaining to commerce and exercised by virtue of legislative grant, are franchises. Such is the result of the application of the principles established by the authorities to the rights and powers of a pilot. Mr. Justice Spencer, in the case of The People vs. The Utica Insurance Co., speaks of franchises as immunities and privileges in which the public have an interest as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power. Says he: "If in England a privilege in the hands of a subject, which the King alone can grant, would be a franchise, with us a privilege or immunity of a public nature which cannot legally be exercised without legislative grant, would be a franchise." (15 John., 387.) Like views are expressed by Mr. Justice Breese in the case of The People, *ex rel.* Kerner, *et al.*, vs. Ridgley, *et al.*, 21 Ill., 66. The right to build and use a railway and take tolls or fares is a franchise of the prerogative character which cannot be exercised without some special grant of the Legislature. (25 Vt., 433.) So in England, to have a fair and market with the right of taking toll is a franchise. So the right of taking toll at bridges, wharfs, and the like, is a franchise. (2 Inst., 220.) In this country the right to take tolls at a ferry is a franchise. In the case of a pilot, his right to collect fees fixed by law for services concerning the commerce of the country, being of a public nature resulting from legislative

grant, is a franchise. When such franchises are granted, and in order to their exercise qualifications are prescribed, the exercise of such franchises by a person not having the requisite qualifications is a usurpation. The remedy here invoked is the proper method by which the State may require the defendant to show by plea and prove a full and complete right and title to the franchise claimed. The information here alleges that this party at the time of his appointment had not served a regular apprenticeship of two years on a pilot-boat on the bar of the port of Pensacola. This, as to that port, is under the law a necessary qualification for such an appointment. The demurrer here interposed admits this allegation to be true, and the result is that it must be overruled, with liberty to defendant to plead.

At the January term, A. D. 1878, Messrs. Jones and Mallory, representing the relator, moved the court "to strike out the plea, because the same is irrelevant, insufficient and not responsive to the information, and for judgment of ouster." The plea set up a license granted by the board of pilot commissioners of the port of Pensacola February 16, 1876, and a bond conditioned to perform the duties of a pilot, and in response to the allegation of the information that respondent had not served a regular apprenticeship for two years, plead the facts stated in the following opinion of the court.

Jones and *Mallory* for the motion.

Respondent, though purporting to answer said information, says, under the heading number one, in said answer: "That he has exercised, enjoyed and performed the franchise, functions and duties of the office of pilot on the bar of the port of Pensacola, Escambia county, State of Florida, since February 16th, 1876, and denies that he has

performed such duties without warrant or authority, as in said information alleged."

As to the insufficiency and inadmissibility of the forego ing plea, see 12 Fla., pp. 264-5-6.

The remainder of respondent's answer or plea undertakes to justify the exercise and enjoyment of said franchise by him. But throughout he omits to allege compliance with the essential requirement without which, under our law, no pilot can be appointed.

In overruling respondent's demurrer to the information in this cause at the last term of court, Juge Westcott, alluding to the requirement of service as a regular apprentice for two years on a pilot-boat on the bar of the port of Pensacola, said:

"This, as to that port, is, under the law, a necessary qualification for such an appointment."

"The defendant must *set up,* and must show that he has a good title. The State is only to answer his particular claim. He must at once show complete title. If he fails, judgment must be given against him." 12 Fla., 265-6.

Respondent, under the 9th heading of his answer, says that he was employed for different periods on certain boats on the bar of Pensacola.

The question of his competency or experience is not material. The "necessary qualification" of having served a regular apprenticeship of two years on a pilot-boat on the bar, is omitted from his showing of title, and in that respondent has failed to set up a good title.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The demurrer to the information being overruled, the defendant, in response to the allegation that he has not served a regular apprenticeship of two years on some pilot-boat on the bar of Pensacola, "pleads that he was employed upon and performed his duties for the term of two years

on the pilot-boat Clarence Barkly, No. 4, receiving instructions from the pilots on board relative to the harbor, the bar, depth of water and courses, and the management of vessels; that he was also employed upon the bar by Benjamin F. Stearns, a licensed pilot upon a licensed pilot-boat called the Ella for the term of two years, and also was employed upon the pilot-boat Lochiel, by Armstrong Baker, a licensed pilot upon the bar of Pensacola, for the term of eighteen months, and he was also employed by Henry Watts, a regular licensed pilot on said bar for the term of one year, making a term of service on said bar of Pensacola of six years and a half previous to his examination and license as pilot on said bar; that the services rendered as aforesaid were those of an able seaman, with a view to perfect himself in the duties appertaining to the office of pilot."

The Attorney-General, through "Jones aud Mallory, attorneys," now moves the court to strike out the plea, because the same is irrelevant, insufficient and not responsive to the information, and for judgment of ouster.

The defendant here, while not alleging an "apprenticeship," in the words of the statute, does set up six and a half years previous service with licensed pilots on pilot-boats on the bar of Pensacola, and that during two years of this service he was receiving instructions from pilots relative to the harbor, depth of water, and courses, and the management of vessels, alleging, at the same time, that he was an able seaman, and that such service was with a view to perfect himself in the duties of a pilot.

In view of the conclusion we reach, we do not deem it necessary to consider whether this motion, looking to the precise character of the plea, is the proper method to raise the question whether the facts therein set up constitute a good defence to the action, or whether it is a plea so defective that it may be treated as confessing the usurpation, and for that reason a judgment of ouster may be awarded.

In the case of the State vs. Gleason, 12 Fla., 264, the plea stricken out was but a repetition of pleas already determined insufficient, and it was apparent that there was no sincerity in the defence. To this point, see also Rex vs. Phillips, Stra., 394; High's Ex. Rem., 524. In addition to this, it will be seen by reference to the case of the State vs. Gleason, that a final judgment of ouster was not awarded upon the view of the court that the plea was insufficient, but upon a failure to file a good plea, after one pronounced immaterial and irrelevant had been stricken out. In other words, upon a default in pleading by which the usurpation was confessed.

The statute controlling the question here raised is as follows:

"The pilots on any of the bars of this State, in addition to the qualifications as pilots now required by law, shall hereafter be required to have served a regular apprenticeship of two years on some pilot-boat, on any such bar."

It is not denied by the State here that the defendant has every qualification other than a two years' regular apprenticeship as required by the statute, and the precise question presented by this motion is whether two years' actual service on a pilot-boat on the bar of Pensacola as an able seaman, with a view to perfect himself in the duties of a pilot, receiving instructions from the pilots on board relative to the harbor, the bar, depth of water and courses, and the management of vessels, do not, within the meaning of the statute, constitute a "regular apprenticeship." It is not necessary that the defendant should plead in the language of the law that he has served a regular apprenticeship. On the contrary, the proper method is to plead such facts as in his judgment constitute a regular apprenticeship, thus affording the opportunity of raising an issue either of law or fact upon the issue.

What is a regular apprenticeship within the meaning of

this statute? At common law, we do not find any system of apprenticeship recognized or established, through which the exclusive right to exercise any trade or profession was derived. There every man might use what lawful trade he pleased. 11 Co., 53. "Without an act of parliament, no man may be restrained either from working in any lawful trade, or using divers mysteries or trades." This matter was for years the subject of discussion in England; the adversaries to such legislation maintaining that such enactments tended to establish monopolies, and that all such restrictions were pernicious to trade—the advocates of the system maintaining that the want of such enactments led to unskillfulness in trades. which was equally, if not more detrimental to the public than monopolists of this character. The advocates of the system prevailed in the contest, and there was an enactment covering the subject, making apprenticeship obligatory. (5th Eliz., Ch. 4, §31.) In 1814, under the provisions of the act of 54 Geo. 3, Ch. 96, apprenticeship ceased to be obligatory. The construction of the early acts by the courts defined apprenticeship, and these rulings are eminently suggestive. The statute of 5th Eliz., Ch. 4. §31, enacted: "That it should not be lawful to any person or persons, other than such as then did lawfully use or exercise any art, mystery or manual occupation, to set up, occupy, use or exercise any craft, mystery or occupation, then used or occupied within the realm of England or Wales, except he should have been brought up therein seven years at the least as an apprentice; nor to set any person on work in such mystery, art or occupation, being not a workman at that day, except he should have been apprenticed as aforesaid, or else being served as an apprentice as aforesaid, became a journeyman, or hired by the year, upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month."

Of this statute Blackstone remarks that "the resolutions of the courts have in general rather confined than extended the restriction, and that following the trade seven years without any effectual prosecution, either as a master or a servant, is sufficient without an actual apprenticeship," citing as authority for this commentary Lord Raym., 79. Wallon, qui tam, vs. Holton, Tr. 33, Geo. II. (by all the judges.)

The same view is announced in the other cases covering the question. Holt, C. J., in Froth's case, (1 Salk., 67,) held that service as an apprentice beyond sea seven years excused from the penalties of this statute; that it was not necessary that the party should be bound.

In the case of Regina vs. Maddox, (2 Salk., 613,) the court held that "upon indictments on the statute of 5 Eliz., in evidence we allow following the trade for seven years to be sufficient without any binding, this being a hard law." 2 Wils., 168; 1 Bl., 233; Show., 242; 2 Keb., 400; 12 Mod., 401; 10 Mod., 70.

The undoubted result of the English cases is, that within the meaning of the statute of 5 Elizabeth an apprenticeship is established "if the defendant can in any manner prove the following of the trade for seven years, and that this will be sufficient without any binding." Buller's Nisi Prius, 193.

This question of qualification for trades, involving skill and practice, we do not find has been the subject of like legislation in the United States. In this country the doctrine of the common law prevails. Here, as a general rule, every man may use whatever lawful trade he pleases. It is left to the community in which he resides to determine by his practice the extent of his knowledge and skill, and to extend their patronage according to their individual wants and judgment.

In this State there is no general statute regulating the subject of apprenticeship for trades. The statute of 1828 di-

rects judges of probate to bind out as apprentices poor orphans, and the statutes of 1866, (Chaps. 1471 and 1557, laws,) authorize an apprenticeship of minors by their parents or guardians. These also authorize the apprenticeship of the children of paupers or vagrants and abandoned children. The purpose of this legislation, however, is simply to provide a means of support and partial education of such children. From such apprenticeship no exclusive rights as to the trade followed. It is an internal police arrangement looking to the employment and education of the indigent minor population of the State. It does not relate to adults. An apprenticeship is required as a qualification only in cases where the employment is connected with quasi public functions or public franchises, as in the present case. This statute does not in express terms require a binding. The purpose of the law is to secure knowledge, capacity, and skill in pilots. This is accomplished by regular, faithful, and active service under a competent pilot, as well without a binding as with it. In view of the fact that our legislation on the subject of apprenticeship is restricted to minors, a construction of this statute which would strictly confine the apprenticeship there required as a qualification to such apprenticeships as are provided for by statute, would disqualify an adult from acquiring the position of a pilot. It would likewise have the effect of restricting the common law rights of the parent, with the assent of the child, to apprentice the child to a pilot without the intervention of a judicial officer, for this is the only authority which, under the statute, has power to bind out. We cannot hold that the Legislature required such an apprenticeship as this. When we leave the statute we must look to the accepted definition of the word apprentice at the common law, under the decisions controlling the subject. We find that under these decisions, in a matter affecting materially the whole trade and commerce of England, the courts have held that a service in the trade or a follow-

ing of the occupation for the time required is an apprenticeship, and that a binding is not necessary.

Our conclusion is, the statute not expressly requiring a binding, that such service as is set up in this plea is sufficient, and that the requirement of a regular apprenticeship is complied with by proof of regular service and employment of such character as is stated in this plea under a competent instructor in the particular business.

The motion is denied.

CALVIN L. ROBINSON, APPELLANT, VS. JOHN O. MATTHEWS, APPELLEE.

1. **What purports to be a bill of exceptions, unattested by the signature of the Judge, but signed and agreed to by counsel for the respective parties, and filed here as an original paper, cannot be considered in this court.**

2. **A bill of exceptions, to be available, must be signed by the Judge, and an original paper, purporting to be a bill of exceptions filed in this court, in addition to and separate from the record as regularly certified, constitutes no part of the record of the judgment of the Circuit Court, and where otherwise there is no error alleged or perceived, the judgment will be affirmed.**

Appeal from the Circuit Court for Duval county.

The appellee recovered a judgment against appellant for $819.07 and costs, in an action of assumpsit upon an open account. The appellant moved for a new trial on the ground that the verdict was contrary to the weight of evidence and the law of the case, and on the ground of newly discovered evidence. The court overruled the motion. The other facts are stated in the opinion of the court.

J. C. Marcy for Appellant.

J. M. Baker for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

What purports to be a record of this case is a certified copy of the record of the Circuit Court, and unattached and separate therefrom we find an original paper filed in this court purporting to be a bill of exceptions. This paper has attached to it an agreement as follows:

"It is agreed that the signature of judge be waived, and that the bill of exceptions herein filed shall be good and effectual for all purposes.

"J. C. MARCY,
Attorney for Appellant.
"JAS. M. BAKER,
Attorney for Appellee."

The statutes of this State and the uniform practice of this court require that a bill of exceptions, to be available in this court, must be signed by the judge. In the case of Proctor vs. Hart, (5 Fla., 470,) this court held that the judge alone (except in case of his refusal, which is provided for in the statute, Thomp. Dig., 351, §3,) is authorized to attest a bill of exceptions; and in Tompkins vs. Eason, (8 Fla., 15,) this court remarked that to commend evidence to the consideration of the appellate court, it must be incorporated into a bill of exceptions, attested as is provided for by the statute.

Even in those States where the practice has been for counsel to sign special or agreed cases on trials at law, such agreed case must be spread at large upon the record as constituting the only legitimate ground for the action of the court. 16 Pet., 301. In all such cases it is necessary that such statement must in some manner be made a part of the record of the judgment of the Circuit Court. 1 Wall., 102.

The judgment is affirmed.

THE CITY OF JACKSONVILLE, APPELLANT, VS. A. W. LAWSON, APPELLEE.

Where there is no bill of exceptions in a case at law, attested by the judge or by bystanders, as provided by statute, the Supreme Court cannot examine the testimony and proceedings had at the trial, or or upon a motion for a new trial. The court cannot examine questions arising on the trial, or on such motion, presented by mere agreement of counsel.

Appeal from the Circuit Court for Duval county.

The appellee recovered judgment in an action upon the case for $275, damages and costs, on the ground stated in the opinion of the court. The other facts necessary to an understanding of the case are stated in the opinion of the court.

E. M. Cheney for Appellant.

J. C. Marcy for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This was an action to recover damages for injuries sustained by the appellee in his person from falling into a sewer, or ditch, in the street, owing to the negligence of the appellant.

The counsel have submitted the case upon briefs. On examining the record, we find no exceptions attested by the judge, as required by law. A memorandum, purporting to be signed by counsel, is copied into the papers returned by the clerk, which purports to give an abstract of testimony given on the trial. There is also a memorandum of the clerk to the effect that a motion for a new trial was made by the appellant upon the ground that "the defendant has discovered new evidence, important and material to its case, since the trial of this cause, and for other good and

sufficient reasons to be argued upon the hearing of this motion," and that the court refused the motion, "to which ruling the defendant excepted and gave notice of appeal." This is the only exception sought to be taken in the case, and even this is not attested by the judge.

The appellant assigns for error:

1. That the verdict was not supported by the evidence.
2. That the damages were excessive.
3. Surprise by plaintiff's testimony; and
4. That the court refused a new trial.

In the absence of a bill of exceptions, there is no method known to the law of informing this court of the proceedings had upon the trial. Our action must bear upon the action of the court and the statute, and the rules plainly point the method of bringing such proceedings here to be reviewed. We must not be expected to decide moot questions, such as may be presented upon stipulations of counsel, for such course is liable to result in great abuse of public justice, and may be unjust and prejudicial to a circuit judge, if it should happen that the counsel have presented a case and obtained a reversal or affirmance of supposed rulings, which would "surprise" the judge when brought to his notice. Hence the statute and rules have made provision of the means by which questions may be brought here for review; and while these methods are possible, we have no right to adopt any other. This court is bound by the law There is no question of jurisdiction, or sufficiency of pleading, or of the form or substance of the judgment,and therefore nothing upon which this court can pronounce judgment on the record before us as to the alleged errors. Cases like the present have often been presented to the court, and as often been dismissed, or the judgment affirmed—one of them, (Robinson vs. Matthews,) at this term, for similar reasons.

The judgment is affirmed.

J. A. LORING ET AL., PLAINTIFFS IN ERROR, VS. W. L. WITTICH, DEFENDANT IN ERROR.

1. A writ of error issued to bring up a judgment wherein the plaintiff in error and nine others were parties defendant, being responded to by sending the record of a judgment wherein the plaintiff in error is the only party defendant, will be quashed on motion.

2. If, however, before entry of the order, the plaintiff in error moves to amend the writ so as to make it conform to the record, this court may, under its statutory powers, allow the amendment. The practice in England and the United States as to amending writs of error considered.

Writ of error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

E. A. Perry for the motion to *quash* and *contra* the motion to *amend*.

Geo. P. Raney for the motion to *amend* and *contra* the motion to *quash*.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Wittich, the defendant in error, here moves to dismiss the writ of error, upon the ground of misjoinder of plaintiffs. The action in the Circuit Court was brought by Wittich against Loring and eight other persons as partners. There was service as to Loring only. The judgment as originally entered was against Loring and the other defendants, naming them. This judgment was subsequently amended by order of the court, and it stands against Loring alone. The *praecipe* for the writ of error is entitled in a case wherein John A. Loring *et als.* are defendants, and the writ of error is to a judgment described as against John A. Loring and nine others, naming the parties.

This writ of error has brought to this court a record of a

judgment wherein the plaintiff in error is the only party defendant to the judgment, while the writ which was brought, and which he caused to issue, was to a judgment wherein nine others with him were parties defendant. The case then is one wherein a writ of error to bring up the record of one judgment is responded to by sending the record of another and different judgment, the difference in the judgment being that one only of the defendants is a party defendant to the judgment brought up, while the judgment in the record of which error is alleged and complained of is against nine others.

No person can bring a writ of error to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore is to receive advantage by the reversal thereof. The writ itself alleges manifest error in the judgment to the damage of the party suing it out. The fact must be consistent with the statement, and parties cannot unite who have not been prejudiced by the judgment. Bacon's Abdg., Error B; 2 Saunders, note 6, 46; Parker vs. Lawrence, Hob. 70; Cro. Jac., 138. In the accomplished Attorney Styles' Practical Register, 281, it is said: "All parties that are grieved by an erroneous judgment may join in a writ of error to reverse the judgment, for this stands with justice; but persons that are not damnified by it cannot join with others that are damnified by it to reverse it, (Mich. 22, Car B. R.,) for the law will not favor any to sue who have no cause nor are concerned."

In trespass against three, there is judgment against two of them by default; the third justifies, and it is found for him. The two only may bring a writ of error, for he for whom the judgment is cannot say that the judgment was to his prejudice. Canon vs. Abbot, 1 Lev., 210. This is the rule in the English Courts,and the like rule prevails in the American.

In the case of Jaqueth and Paddock vs. Jackson and

House, (17 Wend., 434,) a suit in tort was commenced against two, but only one was summoned and declared against, and judgment was rendered against him. Both of the defendants united in suing out a writ to reverse the judgment. The Supreme Court of New York held that the writ should be quashed. In Shaw *et als.* vs. Blair, (4Cush., 97,) there was trespass against three defendants, and judgment was rendered against one only. Upon a writ of error in favor of three, the court held that the defendant against whom the judgment was rendered was alone entitled to reverse the same by error, and quashed the writ in favor of the three.

The conclusion of the court is,therefore,that the motion to quash the writ is well taken; but the plaintiff in error (Loring) here moves to amend by striking out the names of the parties plaintiff in error who were not parties defendant to the judgment in the Circuit Court, and to the question thus raised we address ourselves. A writ of error was amendable at common law, and in the Supreme Court of the United States, where its jurisdiction is regulated by the acts of Congress prescribing the method of proceeding, it was held, anterior to the act of Congress of June 1, 1872, (ch. 255, sec. 3, vol. 17, page 196,) that a writ of error could not be amended. Mr. Chief-Justice Taney, in Hodge *et al.* vs. Williams, (22 How., 88,) speaking for the court, says: "The amendment proposed cannot be made here. An amendment presupposes jurisdiction of the case, and this court have no appellate power over the judgment of the court below, unless the judgment is brought here according to the act of Congress, that is by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not mere matter of form, but matter of substance prescribed by law and essential to the jurisdiction of this court, and if it were amended here by making the plaintiffs

in error defendants and the defendant in error the plaintiff, it would be a new writ made here and not the one issued by the officer appointed by law. Upon this principle the court have uniformly refused to amend writs of error." This last statement seems to be a mistake, for a writ of error was amended in Deneale vs. Stimps' Extrs., 8 Pet., 527. Since the statute of June 1, 1872, amendments within its terms have been allowed. (15 Wall., 684.) The question, therefore, in this matter is, have we any statute of force in this State authorizing this amendment?

Under the statute of 5 Geo. I., ch. 13, the English courts amended a writ of error in the precise particulars in which this writ is now sought to be amended. That statute provided: "That all writs of error wherein there should be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable." This statute is in force in this State, (Thomp.Comp.Manuscript, page 38,) unless it is superseded by the 74th section, chap. 1096, laws 1861, and if it is so superseded, the same power is vested in the courts under the 74th section.

In Verelst and Smith vs. Rafael, 2 Cowp., 425, there was trespass and false imprisonment against two; one only was found guilty. There was a writ of error in the name of both, and it was amended by striking out the name of the defendant who had judgment below.

Lord Mansfield, in disposing of the motion to amend, said: "The ground upon which the application for quashing the writ of error in this case is founded, is because it does not agree with the original record," and the power to amend is derived from 5 Geo. I., ch. 13. In disposing of the motion, he remarked: "If there was any doubts they ought to be extended as far as possible, because it is for the furtherance of justice." A similar ruling was made in the

cases of the Sword-blade Company vs. Dempsey, 2 Str., 892; 1 Str., 683. In the American courts a like liberal rule has prevailed in the matter of amendments of writs of error. 2 Litt., 145; 9 Cow., 304; 12 Ga., 270; 4 Ga., 403; 7 Ala., 577; 8 Ala., 273; 9 Ala., 731; 11 Ala.

Our conclusion is that the amendment is duly applied for and should be allowed. Before disposing of this case, we think it proper to allude to the question of jurisdiction which has been mentioned in the argument, (and which seems to have been the view entertained by the Supreme Court of the United States,) which is, that unless all the requirements of the statute controlling the subject are complied with strictly, there is no power of amendment in the court, the defect being jurisdictional.

The jurisdiction of this court is derived from and defined by the Constitution. It does not proceed from legislative action. A writ of error is a method prescribed by the Legislature through which our jurisdiction is exercised. Such writ is in the nature of a new action. Any defect in it is subject to objection, as in any original writ. If proper parties are not joined, the defendant in error may, under our practice, object by motion to dismiss. Such motion is in the nature of a plea in abatement of the writ. This court having general jurisdiction to issue, hear, and determine writs of error, such a motion cannot be likened to a strict plea to the jurisdiction of the court. Such motion is in the nature of a dilatory plea. It defeats, if successful, the particular proceeding, suit, or action, without reference to the general right of action or the jurisdiction of the court over such particular action when properly instituted.

The amendment is allowed, the plaintiff in error to pay costs of both motions.

A. C. BARNETT, PLAINTIFF IN ERROR, VS. J. B. TONGI, DEFENDANT IN ERROR.

1. An order of the Circuit Judge refusing to allow a supersedeas upon an appeal from the County Judge in a case at law, is not a final judgment from which an appeal, or writ of error, will lie.

2. *Semble*: There is no provision of the Constitution or statutes authorizing a review in the Supreme Court, by appeal or writ of error, of a determination by the Circuit Court upon an appeal from a judgment of the County Judge in proceedings before him, relating to the unlawful detention of lands and tenements.

Writ of error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

A. A. Knight for Plaintiff in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is a writ of error to the Circuit Court for Duval county. The papers before this court, and which constitute the record, consist, *first,* of a petition of plaintiff in error addressed to the circuit judge, alleging that he had been summoned before the county judge, under the act of February 24, 1875, relating to proceedings against delinquent tenants, and had been tried, and judgment had been rendered against him by the county judge, from which judgment he had appealed, but the county judge refused to entertain the appeal and to allow a supersedeas; wherefore he presents his petition to the circuit judge praying that a writ of supersedeas be allowed; and, *second,* an order signed by the circuit judge denying the petition on the ground that an appeal does not lie in such case; and this is entered of record.

This writ of error is prosecuted upon this determination of the circuit court, to reverse it.

Two difficulties seem to stare us in the face at the outset. The constitutional power of this court is limited to "appellate jurisdiction in all cases at law and in equity commenced in circuit courts," and "appeals from the circuit court in cases arising in the county court as a court of probate, and in the management of the estates of infants, and in criminal cases commeuced in the circuit court," and to certain original writs. Const. Art. VI. Sec. 5.

The first difficulty is that there is no judgment of the circuit court in any case "commenced in the circuit court" or elsewhere, the only determination in the matter being a refusal to allow a supersedeas upon an appeal from the county judge. The circuit judge merely declines to act and renders no judgment in the proceedings sought to be brought before him; and as there is no final judgment, there is nothing to appeal from, or to which a writ of error will lie under the statute regulating appeals and writs of error; and second, (it is deemed proper to add,) had there been a judgment of the circuit court in the case upon the appeal, either upon a review or a dismissal of the appeal, it must have been final so far as the power of review of this court is concerned.

The county judges have such jurisdiction relating to the "unlawful detention of lands and tenements, subject to the appellete jurisdiction of the circuit court, as may be provided by law;" but there is no provision in the constitution or statutes authorizing a review of these proceedings by this court by writ of error or appeal.

The writ of error is therefore dismissed.

J.D.BUCKY, APPELLANT, VS. THEO.H.WILLARD, APPELLEE.

1. The provisions of Sections 43 and 44 of Chapter 2040, Laws of 1875, which authorize the filing of a transcript of the judgment of a Justice of the Peace in the office of the clerk of the Circuit Court, and the entry of a memorandum of the filing of such transcript in the judgment docket, and the issuing of execution on such judgment by the clerk, are held to be not in conflict with Section 8 of Article VI. of the Constitution. The proceedings does not call into action or depend upon the jurisdiction of the Circuit Court. Whether the judgment so docketed becomes "a judgment of the Circuit Court," is a question not necessarily involved, as the statute may be operative without reference to it.

2. A part of a statute, or section of a statute, may be unconstitutional and void without affecting the validity of other parts, if they be not dependent upon each other.

3. Whether a Circuit Court has the power to set aside an execution issued by the clerk upon a transcript of a justice's judgment: quere? (See Th. Dig., 360, Sec. 6.)

Westcott, J., dissenting, thought the judgment should have been reversed and the case remanded with directions to quash the writ.

Appeal from the Circuit Court for Duval county.

Willard recovered a judgment against Bucky for seventy-three dollars before a justice of the peace of Duval county, and filed a transcript thereof in the office of the clerk of the circuit court of that county, and the judgment was entered in the docket of circuit court judgments, and the clerk then issued an execution under which the sheriff was about to proceed, when defendant made his affidavit that the execution was issued illegally, because no legal execution could issue from the circuit court upon a judgment rendered by a justice of the peace, and that no part of said execution is justly or legally due.

Upon this affidavit and upon the transcript of the judgment, filed and docketed, a motion was made to set aside the execution upon the grounds stated. This motion was

made under the act of February 15, 1834. Th. Dig., p. 360, Sec. 6.

The court denied the motion, and from this judgment the defendant in the execution appeals. The ground upon which it is alleged the court committed an error is that an execution could not be legally issued from the circuit court to enforce a judgment rendered in a justice's court.

It is urged that the provision of Section 44 of Chapter 2040 of the Laws of 1875, are in conflict with the Constitution. (Sections 8 and 15 of Article VI.)

The eighth Section of Article VI. reads thus:

"The circuit court shall have original jurisdiction in all cases in equity; also in all cases at law in which the demand or value of the property involved exceeds one hundred dollars, * * * and final appellate jurisdiction in all civil cases arising in a court of a justice of the peace in which the account or value of property involved is twenty-five dollars and upwards." Section 43 of the act of 1875 provides that a transcript of a judgment rendered by a justice of the peace may be filed and docketed in the office of the clerk of the circuit court of the county; that the "time of the receipt of the transcript by the clerk shall be noted thereon and entered in the docket of circuit court judgments, and from that time the judgment shall be a judgment of the circuit court, and enforced in like manner as other judgments of the circuit court. No judgment rendered by a justice of the peace shall be a lien on real estate until a transcript thereof shall be filed in the office of the clerk of the court and docketed."

Section 44 reads as follows:

"If the judgment be docketed with the clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the circuit court."

Alva A. Knight for Appellant.

John E. Hartridge for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

Jurisdiction is defined to be an authority or power which a man hath to do justice in causes of complaint brought before him. Tomlin's Law Dic., 6 Peters, 709. "Any movement by a court is necessarily the exercise of jurisdiction. If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." 12 Peters, 718; 2 How., 338.

The Circuit Court was not invoked in the proceedings here brought in question to entertain any cause or matter, or to render a judgment upon a demand of any amount whatever. The exercise of the jurisdiction of that court was not called into requisition by any process, pleading or proceeding, for the purpose of establishing any indebtedness or liability or right of property, It is not pretended that that court exercised any of its functions, or that its "jurisdiction" was called into action for any of the purposes impliedly inhibited by the Constitution.

The objection is this, that as the Circuit Court could take no jurisdiction of an action upon a demand less than one hundred dollars, therefore it must follow that it was incompetent in the Legislature to confer upon it any power to enforce a judgment rendered by a justice's court; and because the Circuit Court could not render a judgment in the case, therefore there cannot be a judgment of the Circuit Court created by any process other than by the exercise of its jurisdiction, and consequently that its process cannot be legitimately used to enforce a judgment so created. This

is the argument deduced from the position of the appellant and from the assignment of error.

Assuming, for the purposes of this case, that the Legislature has no power to authorize a judgment to be entered as "a judgment of the Circuit Court" which the court itself has not power to enter, the inquiry still remains whether the Legislature may not prescribe the manner in which a judgment of a justice's court may become a lien upon real property, and the manner in which such a lien may be enforced.

It is within the province of the Legislature to prescribe the "powers and duties" of justices of the peace. The Legislature may authorize them to render judgment, but prohibit them from issuing executions, conferring that duty upon the clerk of the Circuit Court; the power and jurisdiction of the Circuit Court not being called into action in any degree. The Constitution authorizes the Legislature to prescribe the duties of the clerk, and there is nothing in the matter of his office which makes it incompatible to confer upon him the duty of issuing process under his hand or under the seal of any court, of which seal he may be the custodian, for the enforcement of a justice's judgment. Nor would this trench upon the power or jurisdiction of the Circuit Court, or call for its exercise either by the court or by the clerk. Whether a judgment rendered by a justice of the peace may, in the mode indicated by the forty-third section of the act of 1875, become "a judgment of the Circuit Court," is, therefore, a material question in the case presented. By striking out all the words of that section which seem to give justice's judgments the character or name of judgments of the Circuit Court, or by treating all such words as mere surplusage and nugatory, there still remains the provision that transcripts of justices' judgments may be filed and docketed in the office of the clerk of the Circuit Court, and that from that time the judgment shall be enforced *in like manner* as judgments

of the Circuit Courts; and by the forty-fourth section the execution thereon shall be issued by the clerk to the sheriff, "and have the same effect and be executed in the same manner as other executions of the Circuit Court." The direction of the statute is to the clerk to issue an execution, not to the court, nor need the execution be characterized as an execution of the Circuit Court, as the statute in effect merely requires that the execution and the proceedings thereon be assimilated to the form used by the Circuit Court, and also to the manner of enforcing it.

In all these requirements the jurisdiction of the Circuit Court does not enter. The clerk has certain duties to perform in his relations to the Circuit Court. The duty in question has no reference to any act of that court, or of its judge, and it does not seem that the judge or the court has any office to perform in relation to a transcript of a judgment filed with the clerk.

The object of the statute in question was to remedy a serious evil. Formerly, it is said, justices of the peace, whose places of business were at their dwelling-houses, and whose dockets were often the fly-leaves of their account books, issued executions to constables, who levied upon, sold and conveyed the titles of real estate, making return of the process "when saisfied" to the justice. The Legislature probably realized that the titles of real estate, depending upon such frail records and such uncertain acts of minor officers, were often rendered uncertain and unsafe, and hence, for the purpose of preserving records so important, and affording the means of tracing titles with greater certainty, and of protecting rights so important, passed the act referred to. Purchasers of property are thereby enabled to ascertain, at the office of the custodian of the records, everything necessary to protect themselves in respect to titles, save such facts as may be hidden in old dockets, scattered about the country, or carried away to distant lands by emigrating justices

of the peace. This evil was one deserving the attention of the Legislature, and it is the duty of the courts to uphold their action unless they have clearly transcended their power.

A similar act of the Legislature was passed in Tennessee, and it was provided that where a justices' docket was deposited with the clerk of the county court on the death or removal of the justice, the execution should be issued by the clerk, returnable to *himself*. It was also provided that the clerk might issue a *scire facias* or a judgment to revive the same, making the *scire facias* returnable before himself as county clerk. The Supreme Court held that it was error for the clerk to make the writ returnable before the county court, and the statute referred to was treated by the court as a valid act. See White vs. Davenport, 7 Yerger, 475.

Similar statutes in regard to docketing justices' judgments, and issuing execution thereon by the clerk of courts of record, exist in nearly all the States. The Constitution of Nevada contains a provision restricting the jurisdiction of the district courts in language precisely like that in this State in the particular in question; and her Legislature passed at its earliest session an act in relation to justices' courts and judgments in terms closely identical with the act in question under which the practice here mentioned has never been challenged before the courts, so far as can be ascertained by a careful examination of all her reports. Const. of Nevada, Art. VI., Sec. 6; Compiled Laws of Nevada, p. 441, §557.

Even if it be true that a judgment of a justice of the peace cannot become a judgment of the Circuit Court by the filing of a transcript of the judgment with the clerk, and his entry thereof in the book containing judgments of the Circuit Court, by reason of the constitutional jurisdiction of the latter, yet the statute is not vitiated if, by disregarding its objectional features, it will still stand independent of the unconstitutional portions, even if such portions are contained

in the same section. See Cooley's Constitutional Limitations, ch. 7, pp. 177-8, and numerous authorities cited.

No other question than that we have here treated is raised by the assignment of errors, and the result is that the Circuit Court was right in refusing to set aside the execution.

The question suggests itself whether, if the judgment of a justice of the peace docketed in pursuance of the statute is not a judgment of the Circuit Court, that court has any power to entertain the motion of the appellant to set aside the execution. If it is not an execution issued upon a judgment of the Circuit Court, then the statute (Th. Dig., 360,) does not apply, and that court would probably have no power to control the writ as its own process. The judgment having been docketed, the justice does not issue the execution, and it may not be within his power to control it by a proceeding of this character. The result would be that if such execution was illegally issued by the clerk, the parties would be left to their remedy by such action at law or in equity as might be proper when a right of action shall have accrued.

The proper order in this case is to dismiss the appeal. Ordered accordingly.

MR. JUSTICE WESTCOTT dissented, and filed the following opinion:

The fi. fa. in this case, as disclosed by the record, was issued under the seal of the Circuit Court by the clerk of the Circuit Court, was attested in the name of the judge thereof, and was returnable before the judge thereof. For these reasons I think it was properly treated as an execution issuing from the Circuit Court under the act of February 15, 1834. (Thomp. Dig., 360.) Upon the return of the execution, the record disclosed that it purported to have been issued upon a judgment of the Circuit Court for a sum be-

low the amount of its jurisdiction, and that instead of the judgment being the result of the exercise of the judicial discretion and power of that court, it was upon the face of the transcript of the record then on file a judgment of a justice of the peace. Under these circumstances I am clearly of the opinion that the judgment, so far as it purported to be a judgment of the Circuit Court, was void, and that the execution issued thereon being an execution emanating from that court was necessarily void also. With these views I think the judgment should be reversed and the case remanded, with directions to quash the writ. As it is, the appeal being simply dismissed, I cannot see any escape from the conclusion that we are sustaining the Circuit Court in lending its process to a void judgment and giving effect to an execution both illegal and void. This is not the view of the court, but being my opinion it is my duty to express it. I am not prepared to say that the Legislature may not authorize and require transcripts of justices' judgments to be recorded by the clerk, or even under proper regulations that he might issue an execution thereon; but the regulations must be of such character as to save the question of the jurisdiction of the Circuit Court, as well as preserve the constitutional jurisdiction of the magistrate. With these views I must differ from the court.

A. L. DUNCAN, ET AL., APPELLANTS, VS. JOHN JACKSON, ET ALS., APPELLEES.

1. Where the verdict of the jury is plainly against testimony, as to which there is no question of credibility, a new trial should be awarded. Hence, in an action of ejectment, under our statute, where there is no question as to the allowance of mesne profits, and where the value is fixed by the testimony, the jury must find some damages.

2. Under the statutes of this State, certain occupying claimants, after judgment of eviction against them, may have the value of their improvements assessed by a jury in a particular manner and under a special charge. This and other provisions of the statute are of such character that the value of the improvements cannot be set off before judgment against the mesne profits recoverable as damages in the action of ejectment.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

E. A. Perry for Appellants.

R. L. Campbell for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of ejectment wherein there was judgment for the appellants, who were plaintiffs in the court below. The land for which the action was brought was a lot in the city of Pensacola, and the judgment was for one-half of it. There was a motion for a new trial, which was denied, and from the consequent judgment this appeal is prosecuted. There are several grounds upon which this motion was based, but in the disposition of the case we refer to only one. Under our statute, (Chapter 999, Laws,) the plaintiff is entitled to recover mesne profits. The jury was so instructed in this case. There was no conflict in the tes-

timony. The witness W. F. Lee testified that "a fair rental value of the premises since suit was brought would be about nine dollars per month. I will say one hundred dollars per year. The yearly rental of a vacant lot like lot number thirty would be three or four dollars per month." The jury in giving no damages failed to comply with the instructions of the court, as well as to conform to the uncontradicted testimony in the cause. The respondents insist that the jury did not give damages, because the value of the improvements was considered equal to the rents. If the defendants were entitled to the value of the improvements under the statutes of this State, (the statute for the relief of occupying claimants, Chap. 233, Laws,) the method prescribed by the act for ascertaining the value of the improvements must be followed. Before this is thus ascertained, the defendant cannot be said to have any right which he can set off or recoup. As this case goes again to a jury, we do not comment on the other questions. They relate principally to conclusions of fact, and only involve the consideration of some rules of evidence, which can be best administered without embarrassment from this court in the trial to be had.

Judgment reversed and new trial awarded.

WALTER TATE, (IMPLEADED WITH HOLDEN EVANS) APPELLANT, vs. WILLIAM N. CLEMENTS, APPELLEE.

1. A purchase by a managing partner, engaged in carrying on the business of a copartnership established for the purpose of running a sawmill, of a quantity of chopped corn, the partner ordering it representing that it is required for the business of the firm, and proof that the corn was actually used in the business of the firm, is sufficient to establish

the presumption that the purchase was made in the regular course of the partnership business, and to charge the partners with the indebtedness.

2. A promise by a member of a late copartnership, made after dissolution and before a suit is barred by the statute of limitations, to pay a partnership debt, will not prevent the running of the statute so as to estop the other partner from availing himself of the defence of the statute as against the original cause of action; and this whether the creditor was aware of the dissolution or not.

3. Nor does an admission by one partner, after dissolution, that a debt is due, bind the other late partner so as to take the case out of the statute as to the latter.

4. The "cause of action" in a suit for goods sold is the express or implied promise to pay, and a promise by the party sought to be charged, or facts from which a promise legally results, within the period of the statute of limitations, must be shown to defeat the operation of the statute.

5. A member of a copartnership, after the dissolution, has no *agency* growing out of the former partnership relation to create or to perpetuate a liability of his late copartner for partnership indebtedness, as against the operation of the statute of limitations.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

C. C. Yonge for Appellant.

This is an action of assumpsit for the recovery of the price of a lot of chops alleged to have been sold by the appellee to the appellant in the month of January, (29th,) A. D. 1872, during the existence of a partnership in the saw-mill business, which commenced on the 29th day of January, A. D. 1872, and terminated on the 31st day of December of the same year, according to the articles of copartnership. The defendant Tate plead non-assumpsit and the statute of limitations of four years.

First error.—It is not denied that the account is barred as to defendant Tate, unless the promise of Evans, his late part-

ner, made after the dissolution of the parnership, will operate to prevent the bar. It is claimed that as no notice is shown to have been given to the plaintiff of the dissolution, that this promise was sufficient to prevent the bar of the statute. The doctrine is that one partner cannot bind another by any act of the dissolution, if the party has notice of such dissolution; and if he has no notice,the promise of one partner can only be binding as to matters strictly within the scope of the partnership business. Story on P.

We deny that it is within the scope of partnership, (as that expression is understood in the books) which partnership was formed to conduct a "saw-mill business," to make promises to revive debts. The promise of one partner to bind another is an incident of the partnership during its existence, necessary to the protection of those who deal with it, and for the convenience of the partners themselves, and when the principal to which it is an incident ceases to exist, the incident ceases also. The single exception that is allowed to this rule is: when transactions occur, after the dissolution, within the scope of the partnership, or the credit of the partnership, with parties who had no notice of the dissolution, and in such cases it is held that the power of one partner to bind another survives the dissolution. But the reasons upon which this exception rests do not apply to a promise to pay a debt already contracted. This, however, is neither necessary to the protection of the public nor the convenience of the partners. On the contrary it is one full of danger to the partners, for an insolvent partner may, in the exercise of such a power, years after the dissolution, (for if the power exists there is no limit to the time when it may be exercised) involve his late associate irretrievably by promises to pay debts that never existed. The promise would be harmless to the one making it, by reason of his insolvency, but destruction and ruin to his late partners. And when such promise relates to transactions of which the other

partners are ignorant, it becomes impossible for them to disprove it, or make any effectual defence. When we inquire into the source of this power of one partner to bind another, it is found to be based on the doctrine of agency, and when the partnership terminates the agency ceases, only surviving it as to the exceptional transactions already alluded to. It is absurd to say that making promises to pay debts is within the scope of a partnership for the manufacture of lumber. Acts that fall within the scope of a copartnership must be acts that are connected directly with the particular business the partnership is engaged in, whereas the power of one partner to bind another during the partnership is common to all partnerships.

The statutes of limitations in Florida have been recognized by this court as statutes of repose, and not presumptions, and you cannot therefore rely on the presumption that might arise that a debt had not been paid from the promise of one partner to pay it, but there must be a distinct promise by the party sought to be bound by it in order to prevent the bar. See Angell on Limitations; Daniel on Negotiable Instruments, §358; Brisbon vs. Boyd, 4 Paige, p. 17; Gilchrist vs. Filyau, 2 Fla.

Second error.—The appellant claims that the court erred in holding that if there was no evidence that the purchase of the chops was a part of the business of Tate & Evans, or that they were engaged in mercantile business, that the fact that the chops were used for the benefit of the firm was sufficient to bind the firm for payment. If this be law, then the wholesome limitation of the authority of one partner to bind another, in regard to transactions within the scope of the partnership business, is destroyed, and it is only necessary that the managing partner shall say that the debt contracted (however foreign it may be to the legitimate business of the partnership) was for the benefit of the firm, to create an obligation on the firm to pay it. A partner in the

manufacture of cigars may purchase a ship to transport them, and make his associates ship-owners against their will and with as little knowledge of the purchase as defendant Tate had in this instance of the purchase of the merchandise, the subject of this action, the business of Tate & Evans, being the maanufacture of lumber, and nothing else.

If Evans could bind the firm by the purchase of a bill of merchandise for $100, he could for any larger sum. No question of obligation on the part of Tate by acquiescence arises in this case, for it opportunely appears that he was ignorant of the purchase until just before suit was brought, some five years having elapsed, and there is no evidence of other transactions of a similar character, either by Evans or the firm of Tate & Evans. The same observations are applicable to the second and thrd special charges refused by the court.

The court will notice that all the proofs in the case are to the effect that Evans was the sole actor, and always in his individual character, in connection with this purchase, and the subsequent promises testified to. The purchase was by the individual order of Evans, and not in the name of the firm.

The appellee had but the one transaction with Evans, and none other with the firm. Had never seen Tate, and did not know him. Only knew he was a partner by hearing Evans say so. Only knew Evans to be managing partner from hearing him say so. All the promises were made by Evans, and in his individual name, and all the letters were written by him individually.

These facts prove the theory that this bill was purchased by Evans on his own credit, and is in accord with the idea that the purchase not being within the scope of the partnership, was not contemplated by Evans at the time to be made a charge against the firm, he doubtless intending to pay it

himself, and credit himself with the advance. This also explains the fact that Tate was never informed of it.

I think it sufficiently appears that the court could, in its rulings, and ought to have granted a new trial.

The appellant refers to case of Roumlee vs. VonKeown, 2 Comstock, 523; Shoemaker vs. Benedict, 1 Kernan, 184; Bell vs. Morrison, I Peters, 351; and Payne vs. Slate, 39 Barb., 638.

The above cases establish the proposition that a joint contractor cannot bind his co-contractor by a promise to pay a debt, either barred or not barred, and on the ground that the statute runs against action that had not *accrued* within a given time. If dating from the contract the statute has run, all rights under that contract are gone, and if the party relies on a new contract, to-wit, a promise to pay them, no one is bound but the party promising, either by himself or his agent.

In the case of a partnership, it cannot be claimed that the partner is an agent, because the agency was determined by the dissolution.

The case of Payne vs. Slate, (39 Barbour, 638,) decides that the power of a partner to renew a debt is the same as that of a joint contractor, and nothing more.

No liability can be created on the credit of a partnership which has been dissolved, unless the firm name be used in making the contract. McDonald vs. Fowler, Sneed (Ky.) 245; Kirby vs. Hewitt, 26 Barb., 607.

As to business not connected with the partnership business, one partner cannot bind his copartner by a contract not within the scope of the partnership business, and a knowledge of the limited nature of the partnership may be inferred from circumstances. Livingston vs. Bonvelt, 4 John., 251; Long vs. Carter, 3 Iredell, 238; Minor vs. Downie, 19 Vt., 14; Daniel on Negotiable Instruments, 358.

J. C. Avery for Appellee.

Clements sued Tate & Evans, late copartners, for the price of one hundred bushels of chops. The defendants pleaded—1st, the statute of limitations; 2d, the general issue.

The evidence shows: Tate & Evans were copartners at the time the debt sued upon was contracted, doing a saw mill business. Evans, who was general manager and superintendent of the business, purchased the chops for and in behalf of the firm, and the same were used by the firm. The firm was dissolved in December, 1872, but no notice of the dissolution was ever given, and the plaintiff, Clements, never knew of the dissolution. Within four years appellant's copartner repeatedly promised to pay the debt to Clements. The jury found for Clements, and judgment was entered against both Tate & Evans.

Tate moved for a new trial upon the following grounds:

1. That the verdict was against the weight of the evidence.
2. That the verdict was unsupported by the evidence.
3. That the court erred in charging the jury "that notwithstanding the dissolution of the partnership between Tate & Evans by the terms which limited its duration, and though the law is that the promise of one partner after dissolution cannot take a debt out of the statute of limitations as against another partner, yet, if there has been no notice of dissolution, such promise to a creditor whose claim accrued during the partnership, and who has not had notice of the dissolution, binds all partners;" and in refusing to charge the jury—1st, that unless there is some evidence that buying chops was a part of the saw mill business, or that they had a partnership in mercantile business, the defendant is not liable; 2d, that unless there is proof that satisfies you that the buying of chops was within the scope of the partnership proved to be for conducting a saw mill, that Evans had no power to bind Tate by the purchase of the chops;

3d, that it is not sufficient to bind the partnership that the goods were used for the benefit of the partnership.

The motion was denied, and Tate prosecutes his appeal to this court.

If the court erred as alleged in the third ground of the motion, the first and second are good, but not otherwise. It is therefore necessary to consider the third ground only.

I. Did the court err in the charge given? I think not.

For most purposes one partner is the general agent of his copartners within the scope of the firm business, and the rules which govern in other cases of general agency will apply. Story on Agency, §37.

As to an agent, the revocation of his authority takes effect, so as to bind third parties, when it is made known to them, and not before. Ibid., §470.

The same rule applies to partners. One may bind his late copartner after the dissolution of the copartnership and revocation of agency, if the party with whom he deals has no notice of the dissolution. Parsons on Part., 436-7; 3 Pick., 177.

The commercial world fully recognizes the necessity of notice. All are authorized to think him a partner whom they have had held out to them as a partner, if they have had no notice of his ceasing to be one. Parsons on Part., 426-7 and 412.

It has been held that where there was a dissolution of the copartnership and a subsequent part-payment of a copartnership debt by a partner to a creditor, who did not know of the dissolution, the case was taken out of the statute. Tappan vs. Kimball, 10 Foster, 136, cited at 3 Parsons on Contracts, §83.

Why should not an express promise have an equal result? The argument I make is briefly this: During the partnership one may take a debt out of the statute, as to all, by his promise. After the dissolution, one, dealing with a person

without notice of the dissolution, may bind his partners as if there had been no dissolution. Hence the promise of one partner, after the dissolution, may take the debt out of the statute as against all the partners, in favor of one without notice of the dissolution. Such a rule is just.

Had Clements been advised of the dissolution, he would have known that Evans' promise would not bind Tate, and would have brought suit in time to save his action against the firm.

Where both parties are innocent, he must suffer whose negligence occasioned the error. Pars. on Part., 426-7.

II. Did the court err in refusing the charges asked for by Tate?

The judge assigned the following reason for his refusal: "The purchase by a partner for the partnership raises the presumption of buying within the scope of the partnership business, and the onus is on the objecting party to prove the contrary."

This reason is valid and supported by the law maxim, *Omnia praesumuntur legitime facta donec probetur in contrarium.* Co. Litt., 232, b.

Evans was a partner when he bought the chops, and had the entire management of the business. It is proven they were bought for and used by the firm.

It must therefore be presumed that what Evans did he did within the scope of his power, until the contrary be shown.

The rules of agency may be again invoked.

The responsibility of the principal to third parties is not confined to cases where the contract has been actually made under his express or implied authority. It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or has held out to the public or the other party as having competent authority, although he has, in fact, in the particular instance,

exceeded or violated his instructions or acted without authority. Story on Agency, §443.

This rule would, when applied to partners, seem to bind Evans' copartner for Evans' contract, even if out of the scope of his duties as managing partner, under the circumstances of this case.

As a matter of fact, however, of which the court might perhaps take judicial notice, (saw milling being the leading industry of the locality where this action arose,) the buying of chops is incidental to the saw mill business for the purpose of providing feed for the beasts employed in the hauling of logs.

THE CHIEF JUSTICE delivered the opinion of the court.

The plaintiff below (appellee) declared against appellant and Evans, as late copartners under the style of Tate&Evans, and alleged that they were indebted to him in the sum of one hundred and ten dollars for "one hundred bushels of chops," sold and delivered to them, and in the further sum, &c., (common counts.) Suit was commenced April 26th, 1877. Defendants plead non-assumpsit, and the statute of limitations; that the cause of action did not accrue within four years next before suit. Upon which pleas the plaintiff joins issue. Upon the trial the plaintiff testified that the firm of Tate & Evans, lately doing business at Bluff Springs, Florida, were indebted to him in the sum of one hundred and ten dollars, the purchase money for one hundred bushels chopped corn, sold and shipped to them March 1st, 1872, at one dollar and ten cents per bushel; that it has not been paid; that the firm (by Mr. Evans) has repeatedly promised to pay him within the past four years, verbally and in writing, as shown by Evans' letters exhibited, dating from July 14, 1873, to November 17, 1874. Plaintiff corresponded with Evans, who held himself out

as the managing member and superintendent of the business of the firm; knows of the existence of the firm and its business and management by what Evans told him; of his own knowledge he knows nothing of the dissolution of the firm, and has never received any notice of the dissolution, or that the copartnership had ceased.

On cross-examination plaintiff says he only knows of the existence of the firm by what Evans told him, and has no other knowledge of the commencement of the partnership; the corn was shipped to them on the written order of Mr. Evans, March 1st, 1872; that Evans told him in June, 1872, that such a copartnership existed, and that the business of the firm was the manufacture of pine lumber by steam power, at Bluff Springs; the shipment of this corn was the only transaction he had with the firm; that he has never met Mr. Tate, and does not know him personally.

H. Evans testified that he was superintendent and general manager of the business of Tate & Evans in running a saw mill. In behalf of the firm he purchased of plaintiff one hundred bushels of chops for the firm March 1st, 1872, and it was used by the firm. There was no notice publicly given of the dissolution of the firm. Plaintiff produced three letters signed H. Evans addressed to plaintiff; one dated July 14th, 1873, in which he says:

"Your favor of a recent date to hand. I very much regret that I am not prepared at present to pay you the amount due by Tate and myself, but feel sure that I will be in the course of sixty or ninety days. At any rate you shall have your money long before you can get it by course of law."

The next letter is dated at the "office of Bluff Springs Lumber Company," November 28th, 1873. In this he says:

"Our mill was suspended some two months since, there being no business and no prospects, but that as soon as *we* begin to saw, any lumber you need or can dispose of *I* will

be glad to cut for you. *I* have no money, but the first *I* get you shall have."

The third letter is also dated at the "office of the Bluff Springs Lumber Company," November 17th, 1874. In this he says:

"I will take pleasure in cutting lumber for you, or if you can still indulge me I will pay you the money."

Walter Tate, in his own behalf, testified that the firm of Tate & Evans was formed by written articles of copartnership for the purpose of doing "saw mill business," and no other; that he did not authorize the purchase of the chops by the firm, or by Evans; had no knowledge of the contracting of this debt until a few days before suit; that prior to that time no demand had ever been made for payment, or even notice of its existence had been given either by Evans or any other person. The copartnership began 29th January, 1872, and terminated by the terms of the articles of copartnership December 31st, 1872.

The articles of copartnership were produced in evidence. They recite that Tate and Evans have formed a partnership to expire 31st December, 1872, in which it is agreed that Evans is to take charge of the mill business as superintendent of all work connected with the interest at Bluff Springs, for a compensation, and that Tate "shall take charge of the proceeds of business at Pensacola, in the collection of funds due, and see to the proper disbursement of the same until outstanding dues are settled," &c.

The judge charged the jury, among other things, "that notwithstanding the dissolution of the partnership between Tate and Evans by the terms which limited its duration, and though the law is that the promise of one partner after dissolution cannot take a debt out of the statute of limitations against another partner, yet, if there has been no notice of dissolution, such promise to a creditor whose claim accrued during the parthership, and who has not had notice

of the dissolution, binds all partners." The court refused to charge as requested by defendant:

1st. That unless there is some evidence that the buying of chops was a part of the saw mill business, or that they had a partnership in the mercantile business, then defendant Tate is not liable.

2d. That unless there is proof that satisfies you that the buying of the chops was within the scope of the parnership proved to be for conducting a saw mill, that Evans has no power to bind Tate by the purchase of chops.

3d. That it is not sufficient to bind the partnership that the goods were used for the benefit of the partnership.

The above portion of the charge, and the refusal of the court to instruct the jury as requested, were excepted to, and are assigned as errors. A motion for a new trial on these grounds was denied.

Whether the "buying of chops" was legitimately connected with the business of this partnership, (which was formed for the purpose of running a saw mill,) is a question eminently proper for a jury to decide. "Chops" is probably a provincialism, and we conclude from the testimony and the evident agreement of counsel on the subject, that they understood it to mean "chopped corn." Beyond this we are left to conjecture. It is difficult to say judicially that chopped corn is or is not necessary to carry on a steam saw mill,and yet it may be useful either as fuel,or as food for men and working cattle. It is equally difficult to determine abstractly whether the buying of horses is within the scope of this partnership. If the jury who tried this case was competent to judge that horses and oxen were necessary or useful in hauling logs and lumber at a saw mill, it was equally competent in them to determine that "chops," or chopped corn, was a proper food for the animals, and that the animals required food to sustain life. But we find no direct evidence that this firm employed any working cattle,

and we look further to find that it was shown by the testimony of Evans, the superintendent and general manager of the business of the firm, that he ordered from the plaintiff, in the name and for the use of the firm, one hundred bushels of chops, on the 1st of March, 1872, during the term of the partnership, and that the chops were used by the firm. This evidence was submitted to the jury, under the suggestion of the court, "that a purchase by a partner for the partnership raised the presumption of being within the scope of the partnership, and the onus is on the objecting partner to show otherwise."

This, together with the refusal of the court to give the instructions asked for by defendant's counsel, forms the ground of exception and the alleged error. The ruling of the court has reference to the circumstances of the case before it. Evans, the managing partner, had authority to conduct the business, which implied that he had power to purchase such articles as he deemed necessary for the prosecution of the partnership business. He had ordered, in behalf of the firm, an article which he represented he wanted for the use of the firm, and which was afterward actually used in the business of the firm. This was in March, 1872. In June the plaintiff was informed for the first time, so far as appears, of the general character only of the partnership business. The articles of the copartnership had not been made public, and the plaintiff knew nothing of them.

In the case of Winship et al. vs. the Bank of the U. S., (5 Peters, 529-560,) Chief Justice Marshall, in delivering the opinion of the court, says: "That if the particular terms of the articles were unknown to the public, they had a right to deal with the firm in respect to the business thereof upon the general principles and presumptions of limited partnerships of a like nature; and that any special restrictions did not affect them; that in such partnerships it was within the general authority of the partners to make and

endorse notes, and to obtain advances and credits for the business and benefit of the firm, and if such was the general usage of trade, the authority must be presumed to exist, but that it did not extend to transactions beyond the scope and object of the copartnership. * * * When a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. * * It is usual to buy and sell on credit, and if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership were, perhaps, never published; they are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but they ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law." Citing 2 H. Black., 235; 17 Ves., 412; Gow. on Part., 17; see also Collyer on Part., 3 Am.Ed.,§384, et seq.

From the general principles here announced, it seems to us that the instructions to the jury were proper and applicable to the facts proved; and it seems further, that however correct the abstract proposition contained in the instructions prayed for, if it could be insisted that the plaintiff had been

informed that the articles of copartnership restricted the power of the individual partners in the premises, so as to forbid the purchase of anything but logs, yet, as the instructions were confined to a consideration of the provisions of the articles themselves, which it is not pretended had been brought to the notice of the plaintiff, the court properly refused to give them.

Upon the facts of the case, so far as they relate to the purchase of the "chops," the plaintiff had the very best reasons for believing that the purchase was made in the due prosecution of the business of the firm. The goods were forwarded upon the order of one of the partners, and this was *the* one especially entrusted with the business; and this order implied that the "chops" were required in the prosecution of that business. This, with the fact further proved by the managing partner, that the article purchased of the plaintiff by him, in the name and for the business of the firm, was actually used in the business, precluded the assumption that it was other than a legitimate transaction upon partnership account, and under any proper instruction the jury could not well have found otherwise.

The other question, and the more important one in this case, is, whether the court erred in charging the jury that a promise by one partner, after the dissolution of the partnership, to pay a debt of the firm to a creditor who had no notice of the dissolution, would bind the other partner. There is no question that a promise to pay by one partner, or a part payment of a debt by one during the existence of the partnership, will be binding upon the others so as to take the case out of the operation of the statute of limitations. 3 Kent's Comm., Lecture 43.

The question here is, whether a promise to pay by one partner after dissolution, and before the statute has run, will revive the debt, or take it out of the operation of the staute as to the other partner. The question has under-

gone very much discussion, and is not entirely settled in this country.

The leading case in England was Whitcomb vs. Whiting, (2 Douglas, 652,) decided in 1781, which was an action upon a joint and several promissory note against one of the makers, and it was held that proof of payment by one of the others of interest on the note and part of the principal within six years, took the case out of the statute as to the defendant who was sued. The whole of the reasoning of Lord Mansfield in that case was this: "Payment by one is payment for all, the one acting virtually for all the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due." This case was followed in England for some time without question. Lord Kenyon, however, in 3 Esp. R., 155, expressed some doubts about its correctness; and Lord Ellenborough, in Brandram vs. Wharton, (1 B. and Ald.,) dissents from the doctrine while feeling bound to follow it. He instances the case of thirty or forty persons jointly liable for a debt, which one may actually have paid, yet having lost his receipt he is unable to overcome a promise made by one of the others without his knowledge or consent, and who may not have known of the payment, or who may have intended the very mischief against which it was the evident design of the statute to provide.

In the case of Bell vs. Morrison, (5 Peters, 351,) Mr. Justice Story, delivering the opinion of the court, says: The reasoning of Lord Mansfield "assumes that one party who has the authority to discharge has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole, and that a virtual agency exists by analogy to charge the whole. Now this very position constitutes the matter in controversy. It is true that a payment by one does enure for the benefit of the

whole; but this arises not so much from a virtual agency for the whole as by operation of law, for the payment extinguishes the debt. * * If the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time such acknowledgement was made. * * By the general law of partnership, the act of each partner during the continuance of the partnership, and within the scope of its object, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business, but he cannot bind it by any contracts beyond those limits. A dissolution puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts, and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds."

Referring to the case of Wood vs. Braddock, (1 Taunt., 104,) Justice Story, in the same opinion, says: "The doctrine in 1 Taunt. stands upon a clear, *if it be a legal,* ground; that as to things past the partnership continues, and must always continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy. The light in which we are disposed to consider this question is that after a dissolution of a partnership, no partner can create a cause of action against the other partners except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action, whether it be a supposed pre-existing debt of the partnership or any auxiliary consideration which might prove beneficial to them. Unless adopted by them they are not bound by it."

The case in which these observations occur was one in which the statute of limitations had run before the promise or admission by one of the partners was made. See also 3 Kent's Com. Lecture 48.

The Supreme Court of New York, Kent, C. J., in Hackley, survivor, vs. Patrick, *imp.* with Hastie, (3 John., 536,) held that "after a dissolution of a copartnership, the power of one partner to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note in the name of the firm or any other act." The statute of limitations did not enter into that case, the sole question being as to the power of one partner, who was authorized to adjust the debts due from the copartnership, to bind the others by his admission after the dissolution.

Spencer, J., in Walden vs. Sherburne, (15 John., 424,) referring to the case of Hackley vs. Patrick, says: "It seems that the Court of Common Pleas in England have held otherwise, (1 Taunt.,) but I believe there is more safety in the rule of this court than in a contrary one." The same rule was applied in Baker vs. Stackpole, (9 Cowen, 420,) and it was held that the admission of one partner, either of an account *or any fact,* made after the dissolution of the partnership, is not admissible as evidence to affect any other member of the firm.

In the New York Court of Appeals, Van Keuren vs. Parmelee, 2 Comst., 523, in a case where a promise was made by one partner nine years after the partnership was dissolved, and four years after the statute of limitations had fully run, to pay a note of the firm, Bronson, J., delivering the opinion of the court, says: "In reference to the statute of limitations, a distinction has sometimes been taken between a promise made before the statute has run and one made after the parties have been exonerated by the lapse of time. That would sustain the defence in this case; for the

statute had run upon the claim long before the new promise was made. But the defence may be rested upon the still broader ground that the dissolution of the partnership was a revocation of the agency, and the power of the partners to bind each other by new engagements ceased from that moment." The opinion in that case contains an extensive notice of the cases involving the question, and remarks that "the statute of 21 James I., c. 16, which limited actions on promises to six years, was not very well received by the legal profession, and although the early decisions under it are not open to much observation, it was not long before the courts began to regard the statute with disfavor, and to resort to the most subtle constructions for the purpose of restricting its influence. There was a period when one who was spoken to on the subject of an old debt could not well give a civil answer without saying enough to take the case out of the statute. At a later period, and since the commencement of the present century, the courts began to regard this as a beneficial statute, a statute of repose, and commenced the difficult task of retracing their steps." Noticing the brief reasons for the decision in Whitcomb vs. Whiting, the court says: "Nothing but the great name of Lord Mansfield could have given currency to this reasoning. It is plain enough that 'payment by one is payment for all,' so far as relates to the satisfaction of the debt, but that fact neither shows, nor has any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due, and like any other admission, it can only affect the party who makes it, unless he has authority to speak for others as well as himself. A joint debtor has no such authority." * * "If the meaning be that there is such an agency as will make the payment by one enure to the benefit of all the joint debtors, the reasoning is well enough, but it proves nothing on the point in controversy. If the meaning be that one joint

debtor is the agent of the others for the purpose of making admissions to bind them, that was assuming the very point to be proved, and the assumption had neither authority nor argument to support it. There is nothing in the relation of joint debtors from which such an agency can be inferred. A joint obligation is the only tie that links them together, and from the nature of the case payment of the debt is the only thing which one has authority to do for all. I am persuaded that such a decision would not have been made had it not been for the strong disposition which prevailed at the time to get around the statute of limitations."

The decision in Whitcomb vs. Whiting is said to have been in direct conflict with Bland vs. Haselrig, (2 Vent., 151,) which was decided ninety years before, and in the English cases that have followed, and in some of the early American cases, the same rule was applied, whether the new promise was made before or after the statute had run. "The case of Whitcomb vs. Whiting (says Judge Bronson) has been several times questioned in England, and in Atkins vs. Tredgold (2 B. & C., 23,) the court seemed much disposed to disregard it. But the authority of a great name has proved more than a match for common sense." The learned judge reviews the cases in New York, beginning with Smith vs. Ludlow, 6 John. R., when the statute of limitations was in bad repute, and when few men ventured to think for themselves after Lord Mansfield had spoken, and shows that the courts of that State have been constantly struggling against the arbitrary rule of the judicial Warwick of England, until it has been entirely overthrown, and the Supreme Court of the United States sanctions the emancipation. A still later case in New York was that of Shoemaker vs. Benedict, 11 N. Y., 176, where payments were made by one of several joint makers of a note before the statute of limitations had run upon it, and it was insisted by the plaintiff that this payment took the case out of the

statute as to all the joint makers. The court remarks that it was very well settled in New York before the case of Van Keuren vs. Parmelee, upon authority, that payment by one of several joint debtors, before the statute had run, operated to take the case out of the statute as to all; but the court in this case, upon principle, held that such payments do not affect the defence of the statute as to the other debtors. The court says: "If a new promise is satisfactorily proved, the debt is renewed. The question still recurs, who is authorized to make such promise? If one joint debtor could bind his codebtors to a new contract by implication, as by a payment of a part of a debt for which they were jointly liable, he could do it directly by an express contract. The law will hardly be charged with the inconsistency of authorizing that to be done indirectly which cannot be done directly. If one debtor could bind his codebtors by an unconditional promise, he could by a conditional promise, and a man might find himself a party to a contract to the condition of which he would be a stranger. * * And in principle I see not why a promise made before the statute has attached to a debt should be obligatory when made by one of several joint debtors, when it would not be if the action was barred. The statute operates upon the remedy. The debt always exists. An action brought after the lapse of six years upon a simple contract must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, conditional or absolute;" and see also 5 Wend., 257; 1 Denio, 247.

In Tennessee, 7 Yerger, 534; 2 Humph., 166; in Pennsylvania, 17 S. & R., 126; 1 Pen. & Watts, 135; 10 Harris, 156; 7 Barr, 433; 71 Penn. St. Rep., 208; in Indiana, 2 Blackf., 371; in Illinois, 59 Ill., 524; it is held that a promise by one partner, after the dissolution of the partnership, to pay a note made by the firm, or pay a debt of

the firm, does not take the case out of the statute as to other partners.

In Georgia, Dudley, 138; ib., 100; in North Carolina, 2 Hawks, 209; 5 Ired., 341; 45 Mo., 365; 51 Mo., 31; 35 Conn., 299; 36 ib., 270; it seems that a promise by one partner after dissolution, and before the bar of the statute has attached, is held to bind the other late partners.

Our statute of limitations (Laws 1872, ch. 1869,) declares, sec. 1, that "civil actions can only be commenced within the periods prescribed in this act after the cause of action shall have accrued." Sec. 10: "Actions other than those for the recovery of real property can only be commenced as follows: * * Within two years, first, * * second, * * third, and action on an open account for goods, wares, and merchandise sold and delivered, and an action for any article charged in a store account, shall not be barred until four years."

The issue in the case at bar is whether the cause of action accrued within four years. The declaration does not state when it accrued. The replication takes issue upon the plea. This cause of action accrued when the "chops" were shipped by the plaintiff to the defendants upon their order, or it "accrued" upon the promise of the defendant Evans, contained in his letters, or upon the promises made by him verbally within the past four years. What the language of the verbal promises was does not appear. Evans' first letter (July 14, 1873,) regrets that "I am not prepared at present to pay you the amount due by Tate and myself, but feel sure that I will be in the course of sixty or ninety days; at any rate, you shall have your money long before you can get it by course of law."

The next letter dated at the office of another mill company of which H. Evans was "superintendent" and "E. C. Elmore secretary," proposes to let plaintiff have lumber as soon as they "begin to saw," in "liquidation of my indebt-

edness to you. I have no money, but the first I get you shall have." The third letter from the same office as the foregoing, says: "Anything that I have can go towards what I owe. If you need lumber I will take pleasure in cutting it for you; or if you can still indulge me I will pay you the money." Every promise here expressed is that "I" will pay.

The first letter evidently refers to the indebtedness of Tate & Evans, and so probably do the last two. The first admits an indebtedness by "Tate and myself," and he promises to pay in sixty or ninety days; in the last two, he promises to pay in lumber or in money as soon as he can get it.

During all this time the plaintiff never once calls upon Tate for payment, though Evans always fails to pay according to his promise, and never seeks Tate in any way, and does not know him in person, and leaves him in ignorance that any such indebtedness ever existed against him until five years have elapsed after the accruing of the debt, and the obligation to pay it. This cause of action accrued, so far as the firm is concerned, March 1, 1872.

Did any *cause of action* accrue as to both defendants at any other time? "Each partner may bind the partnership by his contracts in the partnership business, but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation of all power to creat new contracts, and the right of the parties as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds."

The court further says (in Bell vs. Morrison) that this point came before the twelve judges in the case of Hyling vs. Hastings, (1 Lord Raymond, 389, 421,) in the time of Lord Holt. There, one of the points was whether the acknowledgment of a debt within six years would amount to a new promise to bring it out of the statute? and they were

all of opinion that it would not, but that it was *evidence* of a promise. "Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a *new* promise, and that it is the promise which takes the case out of the statute. Now what is a new promise but a new contract? a contract to pay upon a pre-existing consideration which does not of itself bind the party to pay independently of the contract?" The argument of the opinion referred to relates to a case where the statute had run before the new promise was made; but we see no logical difference between an acknowledgment or promise made before or after the operation of the statute, for, as we have seen, the power of the partners to bind each other by promises or contracts which shall affect their future liability is gone the moment the partnership is dissolved. None of the partners can create any new contracts or obligations binding upon the partnership; none of them can buy or sell or pledge goods on account thereof; none of them can endorse or transfer the partnership securities to third persons, or in any other way make their acts the acts of the partnership. In short, none of them can do any act or make any disposition of the partnership property or funds in any manner inconsistent with the primary duty now incumbent upon all of them of winding up the whole concerns of the partnership. And here, the consideration naturally arises whether, since it is incompetent to any of the partners after a dissolution, by any new acts, duties or obligations, to bind the partnership by any acknowledgments or declarations or statements subsequently made by any one of the partners, respecting the real or supposed transactions or duties or obligations of the partnership during the continuance thereof, are binding, as evidence or otherwise, upon the other partners who have not assented thereto. It seems difficult upon principle to perceive how they can be any more than the declarations or acts or acknowl-

edgments of any other agent of the partnership would be after his agency had ceased. In the latter case, they are constantly held inadmissible by the courts of common law, upon grounds which seem absolutely irresistible; and yet the contrary doctrine has been constantly maintained as to partners for a great length of time in the courts of common law in England, founded upon a mere unreasoned decision in the time of Lord Mansfield." Story on Part., §§322-23; 4 John., 224; 15 John., 409; 1 Metcalf, 486; 1 Hill, 572; 2 Hill, 520; 9 Cowen, 420.

The new promise relied on is a new contract upon which the action is based, when it is sought to sustain it by evidence of a new promise, when, but for the new promise, the action would have been barred by the statute. Green vs. Crane, 2 Lord Raym., 1101; Dean vs. Hewitt, 5 Wend., 257; Tompkins vs. Gardner, 1 Denio, 247.

Best, C. J., in Scales vs. Jacob, 3 Bing., 329, says: "In none of the cases has any distinction been made as to the time of the promise, whether before or after the six years; but it is clear that after the six years the plaintiff has no cause of action except on the new promise, and that being conditional, the condition attached to it must be observed."

The statute operates upon the remedy. The debt always exists. An action brought after the lapse of six years upon a simple contract, must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional. The same authority is required to make the promise before as after the six years have elapsed. Shoemaker vs. Benedict, 11 N. Y., 186.

Angell, in his work on Limitations, (Chap. 20, Sec. 25,) says: "After collating and reviewing the cases in England and in this country, that the point to be resolved in all cases is, whether the promise is a mere continuation of the original promise, or whether it is a *new contract*, springing out of, and supported by the original consideration. It clearly ap-

pears, both upon principle and authority, that it is the latter, and the decisions of all the courts throughout the country are remarkably uniform in so establishing it." See also Ch. 21, Sec. 3.

The doctrines held by the courts at an early day, and soon after the enactment of the statute of limitations, that a mere acknowledgment that a debt was not paid or satisfied implied a promise to pay it, is not sustained upon any sound principle. The statute does not proceed upon the theory that after the period of limitation the debt was presumed to be paid, but it was designed as a measure of repose operating upon stale demands. The statute does not declare that if suit is not brought within four years, the demand is presumed to be paid. The presumption of payment arose upon specialties after twenty years, but the statute of limitation declares that "civil actions can only be commenced" within the prescribed period after cause of action accrued. Proof by the acknowledgment of the debtor that a demand is not satisfied, is not more satisfactory than other convincing evidence of the fact, and yet it was never held that such other proof that a claim had not been paid, or otherwise liquidated, draws after it the presumption or implication of a promise to pay, and thus create a new right of action. Why, then, should proof of the fact of non-payment by an admission of the party be anything more than evidence of the fact; and upon what principle can it be said that one mode of proof draws after it consequences which do not follow the other mode? We cannot discern in the admission that there was a debt due "by Tate and myself" anything more than the fact that the debt was then due. No promise is implied. To imply a promise from mere evidence that the demand is not satisfied, would be a bald judicial repeal of the statute, and a nullification of its purposes. The Legislature does not say that the action can only be commenced within four years, *unless* it be shown

that the debt is still due. The language is, without qualification, that the action must be commenced within a given period after the "cause" shall accrue. In an action upon a sealed instrument after twenty years, a plea of payment was the proper plea, and the presumption of payment arose from the lapse of time.

In a suit upon a simple contract, the plea was that the suit was not commenced within a given time after the cause of action accrued, the statute operating as a bar to the suit, because the suit was forbidden by its express terms. The "cause of action" must then be some fact occurring within the time limited.

The action of *assumpsit* is upon promises expressed or implied. A promise to pay a debt, if made within the statutory period before a suit is commenced, is a cause of action, the thing purchased being the consideration of the thing promised, and this is equally the case whether the promise be made on the day of the purchase, or after five years have run—there is no difference; the action must be upon the promise.

All the cases declare that it is the new promise that avoids the operation of the statute, and is the *contract* upon which, if at all, a recovery can be had. The promise is, therefore, the "cause of action," upon which the plaintiff must rely to maintain this suit.

Evans' letter of July 14, 1873, says: "I very much regret that I am not prepared at present to pay you the amount due by Tate and myself,but feel sure that I will be in the course of sixty or ninety days." This is the only occasion on which Tate's name is mentioned in the evidence of admission or promises. All the promises to pay are by Evans' alone; and in the first person. He does not say that the firm of Tate & Evans will pay, but "I will pay." He does not promise in the name, or in behalf of the firm, but in his own behalf; and it seems the plaintiff relied on him

and did not call upon Tate until a short time before the suit, and five years after the indebtedness was contracted. The only promise is Evans' individual promise, unless Evans, by virtue of the former partnership, was an agent of Tate, and his individual promise to pay was the promise of both. It has been shown that after a dissolution, the partners have no power to bind each other by any contract. The only power they possess is to pay and collect debts, to secure the partnership property, and to give receipts, acquittances and acknowledgment of their acts. Story on Part. §328.

This power to wind up the affairs of the partnership does not include the creation of evidence of each other's indebtedness.

In the case of the National Bank vs. Norton (1 Hill, N. Y., 572,) it was held that one partner could not, after dissolution, bind his copartners even by the renewal of a partnership note; nor would a power reserved to him in the articles of dissolution to settle the business of the firm, and for that purpose to use their name, enable him to so bind his copartners. We cannot, upon any theory that seems to be well founded, find any authority in one partner, after dissolution, to change in any manner the legal liability of his late copartners, otherwise than by paying and adjusting the liabilities of the firm, and thus releasing them. But it was said in the plaintiff's brief and argument that because plaintiff had no notice of the dissolution, therefore the partnership continues as to the plaintiff. It is true that where partners have dissolved their relation, third persons who have had transactions with them will be protected in *future* dealings with the partners on account of the firm, unless such third persons have actual or constructive notice of the dissolution. But this applies to future dealings only. As to past transactions the partners remain as they were, debtors, equally liable to pay as though the dissolution had not taken place, (Story Part., §334, and citations; Collyer on Part., §546, 3d

Am. ed.,) but without the power to bind each other by new promises or contracts in respect to such past transactions. Any other rule would place an unfortunate partner under a prolonged and increasing ban of indebtedness at the option of a copartner, who might choose to renew his late copartner's debts by his own mere promise to pay, while the victim might not know for years that he had a creditor. We have an instance in the case at bar. The promise of Evans to the creditor of the firm did not operate to the advantage of Tate, nor did the creditor part with anything of value by means of it. There was not even an agreement on the part of the creditor to extend the time of payment in consideration of Evans' promise to pay. The duty and the obligation of the several partners to collect partnership dues and pay partnership debts, do not include the power of each to charge the other by new promises in respect to past debts, either as to those creditors who have, or who have not, had notice of the dissolution.

The judgment as to the appellant is reversed, and a new trial awarded.

JAMES P. COKER AND LEWIS G. SCHEIFFER, PLAINTIFFS AND APPELLANTS, VS. AMOS HAYES, DEFENDANT AND RESPONDENT.

1. It is the rule of the Code, as well as of the common law practice, that a party cannot, during the progress of a trial, rely with confidence on the strength of his case, take no exception to matters as they occur, or to the charge of the court as given, and afterwards claim the right, either through a motion for a new trial, or otherwise, to have matter already acquiesced in and accepted by him reviewed in an Appellate Court.

2. A simple objection to a question when asked, without an exception to the ruling if the objection is overruled, presents a case of abandon-

ment of the objection. To make such a point available, it is necessary that an exception should be distinctly taken, and placed upon the record.

3. A leading question should be permitted only when it appears essential to justice; where a witness is persistently unwilling, or biased, or there exists some like reason, the court should allow it. In some cases a party may and should be permitted to lead his own witness. This matter, however, is in the discretion of the court. It is not ground of error, and Appellate Courts universally refuse to review such exercise of discretion.

4. After a witness has been examined in chief, and is recalled in rebuttal, the court may, very properly, prevent a simple repetition of his testimony. A party after his examination of a witness, and after closing his testimony, has no absolute right to recall this witness to establish matters not in rebuttal. Whether this rule ought to be varied is a question for the Circuit Court, and an Appellate Court, if it interferes at all, should only do so where it sees that injustice has been done through this action.

5. Questions leading to testimony apparently not pertinent to any issue are properly overruled.

7. Where, upon the face of the record, a question clearly open to the objection that it is leading and suggestive is rejected, and no ground for its rejection appears upon the record, the action of the court must be attributed to this cause, notwithstanding the fact that the inquiry was as to matters properly admissible in rebuttal of antecedent testimony.

7. Where the trial is by jury, the charge of the court must be excepted to when given. Such is the rule when the bill of exceptions is framed under the statute of Westminster II., and such is the rule under the Code.

8. Where the conflicts in testimony are of such character as to involve principally questions of credibility, this court will not assume to perform this exclusive function of a jury. Under the modern system, where parties are permitted to testify, the best tribunal to determine how far a man's interest controls him is a jury of the vicinage. An appellate tribunal is least of all fitted for such a function.

9. Facts alleged in support of a motion for new trial on the ground of surprise, must at least be sworn to, or supported by authentic documentary evidence showing merits. The mere statement of a party is never sufficient.

10. The affidavit of a party based upon information and belief derived from statements of members of a jury as to their conduct in the jury

room, is entitled to no more or other weight than the affidavit of a juror himself; it must stand on the same footing.

18. A juror, after solemnly entering his verdict in court, "is not to be believed or heard" when he afterwards swears that he never approved or consented to the verdict. After the return and affirmance of a verdict in open court, the testimony of jurors as to the motives and influences by which their deliberations were governed should not be received.

Appeal from the Circuit Court for Jackson county.

This case was commenced prior to the adoption of the Code, but the judgment was rendered subsequent thereto.

The facts of the case are stated in the opinion of the court.

McClellan & Milton for Appellants.

Geo. S. Hawkins for Respondent.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action to trover to recover the value of 43,816 pounds of lint cotton alleged to be the property of plaintiffs, and to have been converted by the defendant. The declaration is in the usual form. The defendant plead—first, the general issue; second, that the plaintiffs were not lawfully possessed of the cotton as of their own property; third, because the alleged conversion was and is based upon an alleged contract for the sale of said cotton by defendant to plaintiffs; that plaintiffs did not, under said alleged contract, accept said cotton or part of it, and actually receive the same or give anything in earnest to bind the bargain, or in part payment; nor was there made any note or memorandum in writing of the said bargain or contract and signed by the plaintiffs and defendant, or their agents, thereto lawfully authorized; fourth, that the plaintiffs' alleged cause of action arose from and is founded upon a contract for the sale of the cotton set forth in the plaintiffs' declaration,

between the said Louis Scheiffer and defendant, on or about the 11th day of February, A. D. 1868; that said cotton was obtained from defendant by the fraud, covin and misrepresentation of the said Scheiffer, and that owing thereto defendant was induced to enter into the same; that previous to entering into said contract he asked the said Scheiffer if there had been any advance in the price of cotton in the market; that said Scheiffer answered in the negative, but that he wished to invest in cotton; the defendant avers that there had been a considerable and material advance as to its price immediately previous to the making of said contract, and this defendant has been informed and believes and charges the fact to be that the said Scheiffer was fully aware of and knew of said advance; and that his answer to said defendant's inquiry, as above set forth, was false in fact and in fraud of defendant.

The plaintiffs took issue on the first and second pleas, traversed the third; and so far as the fourth plea or answer was concerned it was filed under the Code practice, and no response was made to it. Upon the trial there was verdict for the defendant. There was a motion for new trial by plaintiffs, which was overruled, and from the consequent judgment for defendant this appeal is taken.

It is thus apparent, the issues all being issues of fact, that the case can be here alone upon exceptions taken during the progress of the trial to the charge of the court, and to its action in overruling this motion for new trial. The assignment of errors embraces twenty-two distinct points. Many of them embrace matters to which no exception was taken during the trial. Portions of the charge of the court too, to which no exception was taken when given, and which were assented to by the appellants when delivered, are sought to be reviewed without any exceptions.

It is the rule of the Code practice, as well as the rule of the common law practice, that a party cannot, during the

progress of the trial, rely with confidence on the strength of his case, take no exceptions to matters as they occur, or to the charge of the court as given, and then afterwards claim the right, either through a motion for a new trial or otherwise, to have such matter already acquiesced in and accepted by him reviewed in an appellate court. The Code in such a case as this provides that the judge who tries the case may entertain a motion, to be made on his minutes, for a new trial upon exceptions, or for insufficient evidence, or excessive damages; and that when an appeal is taken a case or exception must be settled in the usual form, upon which the argument of the appeal must be had. Code, page 64, Sec. 210. Some of the courts of New York hold that such a motion for a new trial can be only upon the grounds named in this section. Voorhees Code, 390, d.

It appears from the case and exceptions that during the progress of the trial, several questions to witnesses were objected to when asked, but there was no exception to the action or ruling of the court admitting them. In such cases it must be held that objection was abandoned. 9 Pet., 418; 7 Wall., 571; 8 Dana, 178; 15 Ind., 4.

The Supreme Court of the United States in Taber vs. Cooper, (7 Wall., 571,) in speaking of just such a case, says: "It does not appear that the objection was overruled and exception taken; it only appears that the testimony was admitted after the objection was made. *Non constat,* but the objection was waived or the decision acquiesced in. In order to make such a point available it is necessary that an exception should be distinctly taken and placed upon the record." This is likewise the rule of the Code.

The first exception taken during the trial is disclosed by the record in this language:

"H. C. Lewis. $50. Identified bill. Objected to and overruled. Excepted to."

It is claimed by the plaintiffs that there was a part pay-

ment in the matter of the alleged sale of seventy-seven bales of cotton to them by the defendant, and that this part payment consisted of the balance of a fifty-dollar note, which remained after paying for a bale of cotton purchased from defendant as the agent of another person. It is claimed by the defendant that the fifty-dollar note was returned to plaintiff at his request, and that the alleged contract to sell or the sale was rescinded. The claim is that H. C. Lewis returned the note. In his testimony he states that it was the identical bill. No ground of objection is here stated, and we are left entirely to presumption to understand upon what ground this objection was based. We can see none. It was pertinent to questions at issue and admissible.

Defendant was asked: "Did you deliver cotton to either of the plaintiffs at Neal's Landing in February, 1868, or at any other time?" The plaintiff objected to this question upon the ground that it was leading, and because it asked for a conclusion of law. One of the questions in this case is, whether there was a delivery of the cotton? This question is certainly leading. We cannot see why the presiding judge did not disallow it. A leading question should be permitted only when it appears essential to promote justice. Where a witness is persistently unwilling and biased, or for some like reason, the court may allow it. While this is true, yet such an exercise of discretion is not reviewable upon error. Such is not the practice of courts where they have like authority to this court to review the action of the inferior court in the matter of refusing new trials. 3 Allen, 465; 2 Gray, 282; 7 Ala., 371; 43 N. H., 65; 30 Mo., 380; 13 Ala., 490; 37 Maine, 346; 36 Maine, 137; 9 Conn., 275; 43 N. H., 65; 22 N. J. L., 372; 20 Ill., 35; 20 N. Y., 170; 64 Maine, 280; 78 Ill., 544; 1 Green Ev., 435.

This question is also open to the second objection viewed in one respect, and viewed in another it is not. The question did not necessarily imply such delivery as transferred

title rather than possession. Delivery is sometimes used in reference to the passing of the property in the chattel; sometimes to the change of the actual possession of the chattel. The connection in which the question is asked shows that it referred to the change of actual possession of the chattel in this case. That was a fact bearing upon the issue, and a matter to which the witness could be properly interrogated.

A receipt of L. Scheiffer & Nephews to Messrs. Freeman, Johnson & Co. for fifty dollars, "deposit made with H. C. Lewis, of Greenwood, Fla., by Louis G. Scheiffer," was offered by plaintiff in connection with the testimony of H. C. Lewis. It was objected to, the objection was overruled, and there was an exception. H. C. Lewis testified that this money was sent by him to these parties for the plaintiff after plaintiff had requested him to send the money to him. The court instructed the jury that the receipt in itself was evidence of a deposit and nothing more.

If the jury believed the testimony of Lewis, he had authority from the plaintiff to get this money. This receipt shows that he (Lewis) did get it, and it was evidence of that fact. Hence, it was evidence bearing upon the issue whether the plaintiff ever received and accepted the return of the money which he alleged he paid the defendant.

Coker, one of the defendants, testified: "I knew that Mr. Belser would deliver cotton to the purchasers without a written order from the parties storing the cotton with him when he had sold the cotton." This was "objected to by the defendant and the objection sustained." To this action plaintiffs excepted. What was the ground of objection here upon the part of either party, we cannot ascertain from the record. We cannot, and do not see, however, the materiality or relevancy of this statement. The plaintiffs do not here claim any delivery by Belser, except as the agent and representative of Hays. The claim is that a part of the cot-

ton was weighed in Hays' presence, and delivered by him, and that the remainder was subsequently weighed and delivered by Belser in conformity with the instructions of Hays. I cannot see the relevancy or materiality of any of this testimony of the witnesses as to the custom of Belser, the warehouseman. The plaintiffs do not claim title through the observance of any custom. They claim no delivery, except through the act of the defendant himself, independent of what was the usage at this warehouse. Certainly this statement, that Belser would deliver without written orders, if it is meant to establish the fact that Belser would undertake, in the absence of the owner and without his authority, to deliver parcels left with him, is a matter not at all material, when it is not even claimed here that Belser made any such delivery. In addition to this, Belser himself had testified that he had delivered cotton on written or verbal orders; that he had delivered cotton without either to merchants, and that he would have delivered cotton on Coker's representation without an order. This was not denied by the defendant, and notwithstanding the rejection of this testimony of Coker as to Belser's personal confidence in individuals, the matter, so far as it could have any bearing upon the transaction, was before the jury. The witness Coker was asked the question: "Did you and L. G. Scheiffer, at Neal's Landing, on the 13th February, A. D. 1868, accept and receive the 77 bales of cotton from Amos Hays?" He answered: "We did; we weighed it, marked it, and received it." Upon motion, this was struck out, and plaintiffs excepted. This witness was here being examined, it is claimed, in rebuttal. He had testified to the facts as they occurred. He had testified that Hays had delivered the cotton when it was weighed, and that Hays was present when he exercised acts denoting exclusive possession. Hays had testified that he had not delivered the cotton; that he was there for the purpose of weighing it, and that his inten-

tion was to do nothing more until he was paid for it. Coker had already testified as to the acts done. This witness had been examined and cross-examined. The strict rule is that the plaintiffs were bound at their peril to ask all material questions in the first instance, and if omitted it could not be done in reply. When evidence is strictly to rebut the case made by the defendant, such evidence may be admitted, although it might have been adduced as part of the original case. This testimony was not strictly in rebuttal. It was simply repeating by the same witness his examination-in-chief. (2 Phil. Ev., 4th ed., 912.) Under these circumstances this rejection of a leading question and statement of conclusions is not a matter which will authorize us to award a new trial. The court could, in its discretion, reject the testimony, and in no event can we see that such action is ground for us to reverse the judgment.

"Did Amos Hayes make any objection to what you and Scheiffer said about running a letter through the cotton and turning the cotton out of the warehouse?"

This question was ruled out, and the action of the court excepted to. This witness in his direct examination had stated, "Belser wanted to throw it (the cotton) out of the back shed. I objected. It might burst the hoops, or damage it. I remarked to Scheiffer, in presence of Hayes, we would not letter it. When we got the full account it would be easy for Baker to letter it for us." When recalled he had already testified: "I claimed the possession, with Mr. Hayes' full consent and knowledge that I did claim it. Scheiffer said 'what letter shall I run through it?' I told him 'we would not letter it until we got two hundred bales, &c.'" We cannot see from the testimony that Mr. Hayes admitted that he heard this conversation, or that he stated that he objected to it. The examination-in-chief of this witness (Coker) had been closed, and there is nothing here in rebuttal, as distinct from evidence, to make out the

case of plaintiffs. This should have been brought out upon the direct examination. There is really nothing in it which this witness had not alreday testified to. He had already stated that Hayes had assented to his possession; he had said, "Mr. Hayes was present all the time when I objected to cotton being rolled out, and we wanted it to remain there some time. Hayes did not object to it."

A party, after closing the examination of a witness, and after closing his testimony, has no absolute right to recall a witness before examined by him to establish matters not in rebuttal, or to simply repeat his testimony. 2 Phil. Ev., 914, 4 Ed.; 11 Barb., 216. Whether this rule ought or ought not to be varied, is a question for the Circuit Court; and a Court of Error, if it should interpose at all in such matters, should not do so except where it sees that injustice has been done through this action. 2 Phil. on Ev., 4 Ed., 879, note; 4 Wend., 249; 6 Wend., 368. Here the matter was already before the jury so far as this witness was concerned.

This witness thus recalled, was asked whether, after the 19th of February, 1868, Scheiffer did not leave the whole subject matter of the purchase of the seventy-seven bales of cotton from defendant solely under his control, and also whether they did, after that date, dissolve their agreement to purchase two hundred bales of cotton to ship to Liverpool. The court sustained objections to these questions, and there was an exception. What the agreements or arrangements between these parties subsequent to February 19th, as to shipping cotton to Liverpool, have to do with the sale of cotton by defendant to them upon that date, we cannot see. There is no such issue presented by the pleadings. This question, so far as it relates to this agreement, was properly overruled. The only purchase in question here was an alleged purchase of seventy-seven bales of cotton from defendant. If there was any such purchase it was

made on or before that date. Such is the claim of the plaintiffs themselves. Any dissolution of an antecedent agreement to purchase two hundred bales could not affect in any way the rights of these parties; nor was it either directly or indirectly in rebuttal of the testimony of Lewis, or any other witness. Everything that Lewis says is consistent with a dissolution of such agreement, ifs uch agreement ever existed. The record does not disclose the ground upon which the question as to the control of the alleged purchase from the defendant was overruled, nor does the record disclose the reason why the court would not allow the question. It simply appears to have been objected to, and the objection sustained. It may have been rejected upon the ground that it was leading and suggestive. This it certainly was, and the court could have properly rejected it on this ground alone. It is true an affirmative answer to the question would have tended to show, that as between the plaintiffs, Coker had at that time control of this matter, and that any act of Scheiffer, looking to a recission of the alleged sale, was inconsistent with that portion of the testimony of Lewis to the effect that Scheiffer requested of him the return of the money alleged to have been delivered and accepted as a part payment. In this view the testimony was properly in rebuttal. The record, however, does not disclose upon what ground this question was not permitted; and as it may have been properly rejected on the ground of its leading character, we are obliged to hold the action of the court correct. Where, upon the face of a record, a question clearly open to the objection that it is leading and suggestive is rejected, and no ground for its rejection appears upon the record, the action of the court must be attributed to this cause, notwithstanding the fact that the inquiry was as to matters properly admissible in rebuttal of antecedent testimony.

After this, in the record, follow the charges of the court, both general and special. To neither was there any objec-

tion or exception, so far as the record discloses. We do not propose to discuss them, however, as they are not presented for our consideration. Where the trial is by a jury, the charge of the court must be excepted to when given. Such is the rule where the bill of exceptions is framed under the statute of Westminister II. This practice prevails in the Supreme Court of the United States. In a like case to this, where the party failed to except while the jury remained at the bar, that court said: "It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury was at the bar." 15 How., 160; 13 Ind. 400; 1 Iowa, 121; 37 Vmt., 471; 2 W. Va., 285; 15 Cal., 183; 31 Mo., 530; 11 Ill., 72; 8 Ind., 376; 3 Iowa, 216; 30 Me., 378; 14 Md., 424; 5 Cush., 14; 43 N. H., 497; 1 S. & M., 679. Such is the rule in New York. 2 Com., 98. In 2 Seldon, 235, the Court of Appeals remarks: "It has been held in many cases that the party complaining of a charge of a judge must put his finger upon the point of which he complains. If he does not do so, no court of review can regard it. A just regard to the fair administration of justice requires that when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences, and does not permit the party to lie by without making his objection, and take the chance of success on the ground in which the judge has placed the cause, and then if he fails to succeed avail himself upon objection, which, if it had been stated, might have been removed."

What has been said disposes of all the exceptions taken upon the trial, and of all matters anterior to the verdict. Under the Code (Sec. 210) the only remaining question is, was there "insufficient evidence or excessive damages?" It is not claimed that there was any excess in the matter of

damages, and, therefore, what we may say should be confined to the "insufficiency of the evidence," if the effect of this section of the Code is thus to fix the power of the court. In one of the cases in New York, treating of this section, the court says, that independent of the terms of the Code, the court before whom the cause is tried has inherent power to prevent injustice by setting aside a verdict manifestly in violation of law. 40 N. Y., 45. If it is meant by this that the court is not restricted in its power by this section, and that it has the same power that it had independent of it, then we cannot see where the statute is given any effect; but it is unnecessary in this case to construe this section, as in any event, whether the rules controlling are those which result from a strict application of the section, or those which prevailed before its enactment, our conclusion in this case is not changed. The remaining grounds upon which a new trial is sought are, that the verdict was contrary to the evidence, to the law, and upon the ground of surprise and misconduct of the jury.

This leads us to a consideration of the evidence as applied to the issues. There is in this case no doubt of the conversion by the defendant, if the plaintiffs had such a property in the goods as is sufficient to maintain this action. The plaintiffs claim property, through a completed sale by the defendant to them, and the true merit of this controversy is just at this point. Much has been said in this case about the matter of earnest to bind a bargain. We dispose of it all by simply stating that it may be admitted for the sake of disposing of the question, that there was earnest given and received to bind a contract of sale and that is not sufficient. The true question here is as to the nature of the sale, and whether there was delivery and payment or a tender equivalent to payment. "No case has been found in the books in which the giving or earnest has been held to pass the property in the subject-matter of the sale, where the completed

bargain, if proved in writing, or any other sufficient manner, would not equally have altered the property."

In the case of Logan vs. Mesurier, (6 Moore P. C., 116,) it was held that where the whole purchase-money had been paid at the time of the contract, property did not pass in the the timber, which was afterwards to be measured on delivery; and it is scarcely conceivable that a penny delivered under the name of earnest could be more effective in altering the property than the payment of the entire price. It is therefore submitted that the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both, and that the enquiry in such cases is to be tested not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest. Benjamin on Sales, 2d Ed., 289.

The principal witnesses in this case as to the fact of delivery and part payment are the parties and the warehouseman Belser. This testimony is substantially as follows:

The plaintiff, Scheiffer, testifies: "That there was an agreement to sell plaintiffs' seventy-seven bales of cotton at ten cents per pound, he agreeing to pay defendant $1000 cash, and give a draft for the balance; that defendant stated that all of the cotton was at Neal's Landing except a few bags, and that he would have it all there by Thursday, at which place it was agreed they would meet and deliver the cotton on that day; that, meeting defendant on that day, he declined to take drafts, but said he would deliver the cotton, and I could have ten or fifteen days to pay for it in; that we then went to the landing; the greater part of it was stored in Belser's warehouse; the cotton was turned out, and Coker and myself marked it, and kept tally of the weights, Hayes being present during the weighing; Hayes asked us if we wanted to buy a bale more at the same price, belonging to one of his hands on his place, and we could

pay cash for it; we said yes, and I gave Hayes fifty dollars, which Hayes said was more than it amounted to, as the bale weighed but four hundred pounds, and that he had no change; I then told him to keep the change and credit it on our purchase now being delivered; when it became late Hayes left and told Belser to send him a memorandum of weights. On the next day, Friday, Belser and myself completed the weighing." Upon cross examination witness states that defendant never, in his presence, instructed the warehouseman not to deliver the cotton to any person without his order or the production of the warehouse receipt.

The plaintiff, Coker, testifies: "On the 11th February, 1868, Mr. Scheiffer and I went to Hayes' house. We told him we wanted to buy his cotton, Scheiffer agreeing to give drafts, defendant saying he would take them; that he would need $800 or $1,000 to pay off hands. We bought the cotton at 10 cents. We were to meet at Neal's Landing on the following Thursday to weigh and deliver the cotton. On meeting again Thursday, defendant said he did not want drafts, saying I have proposed giving Mr. Scheiffer ten or fifteen days to raise the money in, and that he (H.) would put up five hundred dollars, and we put the same amount as a forfeit, and if either one backed down the man who did so was to pay the amount." (Scheiffer also testified to this.) "This we declined upon the ground of confidence in his word. Defendant said I am satisfied—come on, we will go down to Neal's Landing, and I will weigh and deliver you the cotton. When we got to landing we told Mr. Belser our business, that we had bought Mr. Hays' cotton. We went to the shed. Belser wanted to throw it out of the back of the shed. I objected; it might burst the hoops. I proposed to take Hays' weights. He said he would do it, but he had left his memorandum at home. I put weights on bags; Scheiffer took weights in book. I remarked to Hayes in presence of Scheiffer we would not letter it; that when we got

the full amount it would be easy for Belser to letter it for us. Of these lots of cotton some were poorer than Scheiffer thought. After weighing twenty bags Avery came up and wanted to go in the store. Belser had to quit. Hayes then remarked I have another bale for sale that belongs to a negro, weight about 400 pounds. I told him yes, and asked Scheiffer if he had any money. He said yes, and handed Hayes fifty dollars. Hayes remarked that he did not have the change. Scheiffer told him to put the amount of balance on the purchase. Belser came back, and had weighed about forty bags. Hayes said his wife was unwell, and he never remained away from home at night; that he had confidence in Belser as much as in himself. He got in his buggy, and hallowed back to Belser, don't let Coker cheat you, in a laughing manner. He requested B. to make him out a list of weights of cotton and send to him. I left and saw no more weighed. Mr. Belser and Scheiffer continued weighing cotton. After purchase made on Tuesday, it was part of the agreement that we would go to Neal's Landing and weigh and deliver it all that day." This witness was again examined, and stated that "Hayes at the time we went to weigh the cotton at Belser's delivered the cotton to us. I claimed possession and refused to have the cotton throwed out of the shed without Mr. Hayes' full consent and knowledge. I did the marking and putting weights on heads of bales as long as I remained; there were forty-six or forty-eight bales weighed before I left. Scheiffer said, what letter shall I run through it. I told him we would not letter it until we got 200 bales to ship to Liverpool, and Belser could easily letter it then when ordered shipped. Hayes was present when at the landing. I gave directions about it as if it were my property." On cross-examination, as to this second examination this witness says: "I never lettered any of Hayes' cotton. He (Hayes) did not, on the 13th February, when we were weighing the cotton, say to

me or Scheiffer, I delivered the cotton to you. I never received any written or verbal order on Belser to deliver the cotton. The entire money for cotton was not paid. We bought the negroes' bale of cotton and balance, 'became advance on the other.' Admitted that Belser says that he had never delivered the cotton to Coker or Scheiffer." (Judge's notes, page 44, and amendment No. 4.)

Belser, the warehouseman, for the plaintiff, testified: "The parties came to my landing to weigh cotton. I think Hays had 77 bales stored there. They came together, and requested me to weigh it. I asked if cotton was to be shipped soon. I wanted to throw it out below. They objected. We weighed the cotton in shed. It took that day and part of next. On leaving, Hays requested me to represent him. Can't remember what was said as to shipping and marking. A good deal said of it. Don't remember hearing the parties say anything about the payment for cotton. I saw one of them hand Hays money. Hays said that a negro had a bale of cotton they could get at the same price; handed him money. Hays said he had no change. Coker, or one of them, requested him to keep it. Don't remember any other words. Don't remember what the bale weighed. I bought a bale from the negro. Think same bale. Paid him 11 or 11½. It weighed between 400 and 500 pounds. Nothing said at the time what the price was. I understood Hays had sold the cotton at 10. Can't say who told me. Mr. Hays asked me, in going out from dinner, if I did not think they had 'got me a little.' I told him I thought they had. My recollection is, Hays stated they tendered him exchange or drafts on New York, but he required the money, and gave them time to go to Apalachicola for it. Mr. Hays never gave me a verbal order to deliver the cotton to Mr. Coker or Scheiffer, and I never delivered them any for him."

The defendant testifies: "I remarked there was a boy on

my place who had a bale of cotton he wanted me to sell, and wanted me to sell it for him. Mr. Scheiffer remarked he would take the bale of cotton, and that he would give me the money to pay for it. He handed me fifty dollars, and I remarked that was more than the bale of cotton came to; that I did not think it was a very heavy bale; that I had no change. He said keep it; it made no difference. That was what passed about the bale of cotton. Neither Coker nor Scheiffer told me to apply the surplus towards payment of the other lot of cotton. The bargain for sale of cotton was made on the 11th February, 1868. I asked if there was any rise in cotton; said none that they knew of. Mr. Scheiffer said he would buy my lot and give me ten cents a pound for it. I told him I concluded to take the offer he made. He remarked that he was not prepared to pay for so large an amount of cotton, and that he would give me a draft on New Orleans or New York. I did not wish drafts on New York or New Orleans. He said he was not prepared to pay money for it if I did not take drafts. I told him I wanted some money to pay the hands that made it. Hands due one-third. He asked me then what amount I would need to settle off with them. I told him it would take about one thousand dollars. He remarked he did not have that amount but though he could raise it. When we got to that, I said you and I don't know what the cotton will weigh to ascertain how much you would have to pay me. We agreed to go to the river to weigh the cotton on Thursday. We met at Greenwood on Thursday morning. I told Mr. Scheiffer I concluded not to take any drafts for my cotton; that I must have the money. He said that would break up the trade; that he did not have the money. Scheiffer asked me then how long a time I would give him to raise the money. I remarked eight or ten days. He said then we will go to the river and weigh it to ascertain how much money he would have to get. No part of the contract

in writing. When we arrived at the river, said to Mr. Belser, I have come down to weigh my cotton. The plaintiffs were present when I said this. Mr. B. asked me if I was going to have it turned out of the warehouse. I said I had rather not, as I did not know when the cotton would be delivered as he did not have the money. We weighed twenty-seven bales. Belser was the weigher while I was there. I left about an hour by sun. I don't know who weighed after I left. I never gave any order or warehouse receipts or verbal order to Belser to deliver the cotton to Scheiffer or Coker. I could not tell how far Coker and Scheiffer were from me when I gave Belser instructions as to the cotton. I was near enough to Belser for him to hear me. I instructed him as I was going away to finish weighing the cotton, to send me the weights, and not to turn over the cotton to any one without both a written order from me and the warehouse receipt, as the cotton was mine. I never received any money on this contract as payment, or otherwise, at any time."

As to the fifty-dollar bill this witness says: "I told Scheiffer he could get the cotton of boy at the same price; he handed me fifty dollars; I had not weighed the cotton at that time. While at Greenwood on Thursday, I proposed to Mr. Scheiffer to put up a forfeit of five hundred dollars, the one backs out to pay the forfeit; this was after I had told Scheiffer I would not take drafts. About the time I told him I would give him time to get the money, I made proposition to see what he was going to do, if he was going to try to get money. On reaching the river I said to Mr. Belser, don't you think he got me a little? From Belser's remarks I thought there was little spur in the market. I left Belser to finish weighing the cotton; the weights of the bales as shown by exhibit in evidence was 43,816 pounds, which, at 10 cents, is $4,381.60." Belser, being again examined, says: "Hayes gave me instructions as to shipping

and delivering cotton; I am satisfied Coker and Scheiffer did not hear them."

The theory of the plaintiffs as to this testimony is that the contract as modified on Thursday, at Greenwood, was that ten or fifteen days' time was given for payment; that the cotton was weighed and delivered at the landing on that and the next day, and a part payment of eight or ten dollars on the amount due was paid. In other words, that the sale was a sale on credit, and that the property passed by an actual delivery.

The theory of the defendant is that he refused positively any drafts; that no credit entered into the matter; that the agreement was for a sale for cash, the plaintiffs to have ten or fifteen days to raise the money; that all that was done at the landing was simply a weighing of the cotton to ascertain the price; that no delivery was had, and that none was to be had or made, and no property was to pass until he was paid the price at the time agreed upon; that he received nothing, either as earnest or part payment from the parties; that defendant agreed to a sale for cash, giving time to raise the money, the property not to pass until payment. Benjamin on Sales, §320, and cases cited.

We do not propose to enter into any elaborate examination and discussion of this testimony. It is not our province to weigh such conflicts or discuss credibility. No one, unprejudiced and disinterested, can read it without seeing that the question involved is a pure question of credibility. How can it be said from this testimony that it is clear that the owner intended to part with his property, and that it was the intention of the parties that the property should pass, before payment of the price, or that there was a sale upon credit of eight or ten days, when the defendant, according to the testimony of all the parties, refused drafts, and only agreed to sell for money, giving time to raise it? In other words, in the language of the appellant's counsel, "Coker

and Scheiffer were to pay all cash, and have ten or fifteen days to raise the money in." There cannot be a sale for cash on credit.

In addition to the testimony of the parties and Belser, showing the actual facts connected with this transaction, we have in the record the testimony of McNealy, Robinson, Parker, Erwin and Bryan, as to the statements of the defendant made to them at the time. McNealy says Hayes told him he had sold the cotton, but would not let the parties have it, as cotton had gone up and no money paid him. Robinson says he was at the landing; that Mr. Hayes said he had sold; that he was to get ten cents, and was to weigh it that day. Parker states that Hayes told him that he had sold his cotton for ten cents; that he was to go down in a few days and deliver it, provided they had the money for it. Erwin states that Hayes told him he had sold his cotton for ten cents, and was going to the landing on that day or the next to deliver it. "We had a conversation about drafts. I told him I did not consider any man's draft as good as the money." All of these statements, it is apparent, relate to a debt antecedent to any identification or weighing of the goods. There was no contract in writing. It is not even claimed that at this time any earnest had been paid or part payment made. The conversation of Erwin very plainly relates to the time when Hayes said he would take drafts. It is admitted that he refused to do so afterwards. What he says to Parker appears to have been after he had given time to "raise the money in," as he says he had sold to deliver it, provided they had the money to pay for it. These statements are consistent with the testimony of the parties. What Hayes meant and what alone he could mean by the term sold when used anterior to the meeting at the landing, was a simple verbal agreement or bargain to sell without earnest, part payment, or anything making it effective. These witnesses are not testifying in view of nice legal dis-

tinction like this, but connecting the circumstances with the other testimony, what we have stated is all that it amounts to.

But it is insisted that there was a tender within the time agreed upon of the price to be paid, and that the effect of this was to pass the property. It is unnecessary to state the law as applicable to such a state of facts, unless such facts are shown.

The testimony of plaintiff Scheiffer as to this matter is as follows:

"On the same evening that the weighing was completed I went to Apalachicola, stayed there a day under heavy expense, and with great difficulty raised the money, barely $4000. Upon my return from Apalachicola, Mr. Coker and I went to defendant's house to pay for cotton. Mr. Hayes met us at the gate; I told him I had just returned, let us go in some safe place and I will pay what I owe. Hayes replied, gentlemen, you can't have my cotton. I replied, the cotton is ours." Upon cross-examination he says, "I pulled the money out of my lap."

The plaintiff, Coker, testifies: "That upon arrival at Mr. Hayes' house, Scheiffer told him we don't want to disturb you; we want some private place to pay you, and pulled the money out in his hand. Mr. Hayes remarked, you can't have the cotton. Scheiffer remarked, it is our cotton; we bought it, received it, and advanced on it. Mr. Scheiffer had about $5000; we counted it in my office before we went there. Mr. S. took the money out of pocket in hand and said we want a private place to count it. This was the Wednesday after we weighed cotton at Neal's Landing."

Amos Hayes, the defendant, testifies: "That neither Scheiffer nor Coker exhibited any money to him in payment of the cotton on the 19th of February, A. D. 1868; I saw no money."

James E. Bryan testifies: "That he witnessed part of an

interview between the parties on the 19th of February, 1868; saw no money tendered defandant for a lot of cotton; A. P. Hayes way present; I do not state all that was done on that occasion."

A. P. Hayes testifies: "Was present when plaintiffs came upon the 19th of February, and witnessed the interview between them; nothing was said about the payment of any money by the plaintiffs to the defendant; saw no tender and heard no offer to pay except the money offered by Hayes to plaintiffs; that no other money was exhibited upon the occasion, and if any had been he would have seen it; was in five or six feet of them all the time; neither of the plaintiffs offered to pay the defendant a large sum of money on account of cotton, nor did either of them offer to go to any place where any money should be counted for that purpose, nor did Amos Hayes refuse to do so; am a brother of Amos Hayes."

Plaintiff Coker, in rebuttal, testifies: "A. P. Hayes and Bryan were not present when I had the conversation with Amos Hayes about the cotton; they were some distance from us, and considerable conversation had passed before they came up; Scheiffer pulled out the roll of money and said, let us go to some safe place so we can count it."

It is thus seen that Coker swears to a tender, and that A. P. Hayes was not present. A. P. Hayes swears he was present all the time, and that nothing of the kind happened. Scheiffer swears that he said to Hayes, let us go in some safe place and I will pay what I owe on the cotton, and that he pulled the money out of his lap. Hayes swears that neither Scheiffer nor Coker exhibited any money to him in payment of the cotton; and Bryan, who was present a part of the time, saw no money tendered. Again we have simply a conflict of testimony—a pure question of credibility. Plaintiffs swears to one state of facts; defendant swears he saw no money, and his brother swears that he was present

all the time, and that there was no tender or offer to count the money.

What principle of law will justify us in setting aside a verdict of a jury because one or the other of these parties was not believed? If there is any question exclusively for a jury it is just this question. A court or judge, presuming to set aside a verdict under these circumstances, exceeds legitimate constitutional functions, and takes from the citizen one of his first and greatest rights. This is especially true where, under the modern system, parties are not excluded from testifying on account of interest. In conflicts of this character, the extent to which a man is or will be controlled by his interest is a question necessarily involved, and there is no tribunal or body of men so well qualified to pass upon that question as the residents of the vicinage; certainly an appellate tribunal is least of all fitted for such a function. This matter must rest where the jury placed it.

There was evidence also applicable to the pleas of fraud and to the alleged rescission of contracts. As to the first, the evidence is equally, if not more conflicting, than it was as to the primary matter of the sale itself. As to the second, the evidence was that of one witness for the defendant, who stated that at Scheiffer's request he obtained and sent to the firm of which S. was a member the amount which the plaintiffs insist was paid as a part payment on the alleged sale, as well as to certain statements of plaintiff Scheiffer in reference to the sale made subsequent thereto. There is no ground for a new trial as to either of these matters.

This brings us to the consideration of the alleged matter of surprise, the next ground upon which a new trial was sought.

There is a paper in the record commencing "Lewis G. Scheiffer, one of the above plaintiffs, being duly sworn, says," and ends by the signature of Lewis G. Scheiffer without any jurat or any evidence that any oath was taken. Be-

low this paper, thus signed, is a statement that Scheiffer was known to E. R. Powers, a notary public of New York, and that he acknowledged that the above is his signature. The statements of Scheiffer in this paper deny specifically the testimony of Lewis, deny his agency, or that he made such statements to Lewis as Lewis stated he did in his testimony. There is no file mark on this paper, but the statement seems to have been signed on the 17th of August, 1876, while the motion for a new trial was made June 1, 1876, and was overruled March 30, 1877.

This paper is nothing more than a statement of the plaintiff (not sworn to) that he did not make the statements to a witness for the defendant which that person alleged under oath he did make. This is no showing for a new trial on the ground of surprise. The rule is, that facts alleged in support of such a motion must at least be sworn to or supported by authentic documentary evidence showing merits. The mere statement of the party applying for a new trial is never sufficient.

The only remaining ground for a new trial brought to our attention by the record is the alleged misconduct of the jury. This is based upon several affidavits in the record. The first is the affidavit of J. P. Coker, plaintiff, to the effect that he is informed and believes that many of the jurors say they did not render their verdict upon the evidence in the case, but upon the charge of the court; that he is informed that Jerry Pope, one of the jurors who set in the case, was driven to find the verdict he did through intimidation, fear, and by undue influence, by insinuating that he was bribed, and by cursing him indirectly and abusing him for differing with them; and that he is informed and believes that some of the jurors who tried the case were influenced to find the verdict through prejudice, passion, and other motives that should not have controlled them; that B. F. Barnes, one of the jurors, gave evidence in the jury-room to the effect that

the affiant had been bought out at Greenwood several years ago by parties to get clear of him, to let him leave there, thus intending to influence the minds of the jurors improperly; that he is informed and believes that J. W. Mitchell, one of the jurors, was prompted, through prejudice and passion, to find a verdict for defendant; that said juror was prejudiced against J. F. McClellan, one of his attorneys, and was heard to say, while sitting upon this case, that he was going back to the court-house to hear old McClellan lie some more in that case, meaning this case; that to find a verdict for plaintiff would be imposing upon farmers, and that would never do; that it was not right to give a farmer's work to a merchant; that he was heard to say, while sitting in the cause, that he was not under oath not to talk about the case, "that he had done passed his opinion about the cotton; that he was not going to find for merchants to buy cotton from planters and carry it off to them Northern folks; that he is informed and believes that Mitchell violated the instructions of the court, not to talk about the case, by talking to one Walter Bryan about the case while dispersed under instructions."

Beverly Baker swears that he heard Mitchell use the remark as to J. F. McClellan.

Pope, one of the jurors, swears that he did not assent to the verdict because he was satisfied that the evidence under the charge of the court warranted it, but because of the discontent of many of the jurors at his not agreeing with them, and because several of the jurors cursed around and abused him, and because they signified he was bribed not to agree with them; that for these reasons, and the additional one that he was the only one hanging the jury, he finally consented to the verdict rendered; that B. F. Barnes, one of the jurors, gave evidence in the jury-room against J. P. Coker's character, by stating he had been bought out at Greenwood several years ago by citizens there in order to

get clear of him; and also that he and J. W. Mitchell said to find a verdict for plaintiffs would be imposing upon farmers, and that would never do, that it was not right to give a farmer's work to a merchant.

Ely swears also that he heard Mitchell make the statement as to plaintiff's counsel. Fuller Bellamy swears that he heard Mitchel say that he was not under any oath not to talk about the case; that he had done passed his opinion about the cotton; that he was not going to find for merchants to buy cotton from planters and carry it off to those Northern folks.

Mitchell himself, in reply to this, swears that all the statements sworn to by Fuller Bellamy are false and untrue; that he never said to Bryan what Fuller states he did say; and Bryan himself swears that Mitchell made no such statement to him. Mitchell swears further that he has no prejudice against plaintiff's counsel, and that while he did make the remarks stated,yet that it was in fun and joke, as he has often done about other attorneys, and that he rendered his verdict upon the law and evidence.

As to the affidavit of the plaintiff Coker. In no State can we find that the affidavit of a plaintiff, upon information and belief (which, as a matter of course, must be derived from the jury,) as to acts of the jury of the character here disclosed, is sufficient upon which to base a motion for new trial. There are few, if any, unsuccessful plaintiffs who will not swear to a belief that a jury acted from prejudice or passion, or some other improper motive, and to make such statements effective for such a purpose would be to have new trials in all cases where plaintiffs are confident of the clear justice of their cause; for in the degree, and to the extent that they believe they are right, it is natural for them to believe that those who find and say otherwise are controlled by some other motive than a just and proper regard to the law and the evidence.

It is apparent from the affidavits of the jurors filed with this general affidavit of the party that the statements in the general affidavit are based upon those made by the jurors themselves. So far as Mitchell's statement concerning plaintiff's counsel is concerned, Mitchell himself explains it. He says it was a mere jest, a joke, a remark he frequently made as to other attorneys. This juror also swears that he made no such statements as to finding against farmers as were attributed to him, and the affidavit of Bellamy is met by the affidavit of Bryan. Unless there is something in the affidavit of Pope, there is nothing in any of the others to justify setting aside this verdict. Pope says he did not assent to the verdict because he thought it warranted by the law and the evidence, but because of the discontent of many of the jurors at his not agreeing with them; that several of the jurors cursed around and about him, and signified he was bribed not to agree with them; that for these reasons, and the additional one that he was the only one hanging the jury, he finally consented to the verdict rendered. Is the affidavit of this juror to be received to impeach his verdict? In the case of Grinnel vs. Phillips, (1 Mass., 542,) where the juror swore that in his mind he had never approved the verdict, or consented to it, Sewall, J., said: "As to this point the witness is not to be believed or heard. The record of a verdict implies a unanimous consent of the jury, and is conclusive and incontrovertible evidence of the fact." There can be no doubt upon this general question. (Salk., 645; 1 T. R., 11; 2 id., 281; 4 Bos. & Pul., 326; 4 John., 487; 5 Hill, 560; 12 How. Pr., 428; 5 Dev., 367; 12 Kan., 539; 48 Cal., 85; 37 Iowa, 339.) It is needless to discuss the reasons for the rule. The oath of a juror is not admissible to impeach his verdict.

In a recent case in the Supreme Court of Massachusetts, (107 Mass., 461,) the English and many of the American cases are reviewed. The court there say: "We have not

found in England any case since the begining of this century in which, after the return and affirmance of a verdict in open court, the testimony of jurors to the motives and influence by which their deliberations were governed has been admitted."

This disposes of all the questions presented by this record, all of which have received careful attention and consideration.

The judgment is affirmed.

THOMAS A. GODWIN, PLAINTIFF AND RESPONDENT, VS. HAMILTON G. BRYAN, DEFENDANT AND APPELLANT.

1. **The Appellate Court will not review the rulings or the charge of the Court upon a trial by jury, unless exceptions were duly taken before the rendition of the verdict.**
2. **Exceptions to the decision of the Court upon a motion for a new trial, are of no avail so far as they relate to rulings of the Judge upon the trial of a cause, if such rulings were not excepted to during the trial. This rule prevails as well in cases which arose under the Code as under the former and the present practice in this State.**
3. **A new trial should not be granted upon proof of declarations made by a juror relating to the deliberations of the jury.**

Appeal from the Circuit Court for Jackson county.

This was an action upon a promissory note dated in March, 1862, payable in twelve months, for $1,409.40 and interest. The suit was brought in 1872 under the "Code of procedure."

Defendant (appellant) answered that the note was payable in Confederate States Treasury Notes, these having been the prevailing currency at its date; and that in January, 1864, plaintiff agreed to receive the principal and interest

then due from defendant in that currency, and that confiding in such agreement, defendant collected from one Speight, upon a note he held against Speight, an amount of such notes sufficient to pay the principal and interest due plaintiff on the note in suit; but plaintiff then refused to receive the same, although it was duly offered and tendered to him without delay; and defendant avers that he would not have collected the Confederate notes from Speight but for the plaintiff's promise to receive it is payment; that at the close of the war the notes became valueless, Speight died, the defendant suffered a total loss of the amount, which loss was caused by plaintiff's agreement and refusal to receive such notes in payment.

Plaintiff replied, denying the allegations of the answer. The cause was tried before a jury, who rendered a verdict in favor of the plaintiff for the amount of the note and unpaid interest, upon which judgment was entered.

After verdict, appellant moved for a new trial on the grounds of excessive damages; that the verdict was against law and the evidence, against the charge of the court, against the weight of evidence; and "that the court erred in charging that the defendant was not entitled to claim what was lost by him in consequence of the refusal of the plaintiff to receive Confederate States notes, obtained by him from Speight on his note, under the alleged agreement between them." Appellant afterwards added, as another ground of the motion, that one of the jurors who tried the cause was biased, and the affidavit of one Alford was offered to sustain this ground of the motion, in which Alford states that "Belser, one of the jurors who tried the case, told him after the verdict that he knew nothing about the case, but found for plaintiff, Godwin."

The circuit judge denied the motion, to which appellant excepted, and now appeals from the judgment.

The appellant assigns error as follows: first, the court

erred in not granting the defendant a new trial; second, third and fourth, that the court erred in charging the jury certain matters (quoting from the charge of the court) which are alleged to be erroneous and tending to mislead the jury.

J. F. McClellan for Appellant.

D. L. McKinnon for Respondent.

THE CHIEF JUSTICE delivered the opinion of the court.

With respect to the errors assigned as to the charge of the court to the jury, we find that no exception whatever was taken to any portion of it until after the verdict was rendered the jury discharged. The earliest suggestion that the appellant was not content with the charge as delivered to the jury is found in the motion for a new trial. This is not sufficient. If any matter contained in the instructions given by the judge to the jury be not satisfactory to the parties, or if they deem them erroneous, they should, at the time and before the jury leave the bar, call the attention of the court to the point, so that the judge may have the opportunity to correct the error, and that an exception to the ruling may be noted in the judge's minutes. If a party tacitly consent to the giving of the instruction by failing to except, he cannot afterwards take advantage of a supposed error in the judge's charge. There is no conflict of authority on this subject.

In order to have a review by this court (the court of appeals) of a determination of the Supreme or Superior Court, upon a motion for a new trial, after a trial by jury, there must be a bill of *exceptions taken at the trial* in the court below. Livingston vs. Radcliff, 2 Comstock (N. Y.), 189.

The exception to the determination of the Superior Court upon a motion for a new trial amounts to nothing as author-

ity for this court to review such determination. Onon. Co. Mut. Ins. Co. vs. Minard, 2 Comst., 98.

Exceptions cannot be sustained unless the instructions complained of were excepted to while the jury were at the bar. It is too late to except after verdict. Phelps vs. Mayer, 15 How., 160; State vs. Clark, 37 Vt., 471; Nabenbausch vs. Shaver, 2 W.Va., 285; Mattingly vs. Moranville, 11 Mo., 604; McKell vs. Wright, 4 Iowa, 504; Anderson vs. Hill, 12 Sm. and Mar.,679; McAdams vs. Stillwell, 13 Pa. St., 90.

The case at bar was commenced under the Code of Procedure, but the rule under the Code is still the same upon this point. The section of the Code authorizing exceptions to be filed within ten days after judgment refers to trials before the court without a jury. This, however, does not authorize exceptions to be taken after judgment to matters arising during the trial, and where there is an opportunity to except at the time the adverse decision is made. Hunt vs. Bloomer, 13 N. Y., 341; Bogue vs. McDonald, 14 Fla.,66.

By section 210 of the late Code in this State, the former rule, as to exceptions upon a trial by a jury, was preserved. "If an exception be taken it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the rules of the court. * * * The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial *upon exceptions,*" &c.

It seems, therefore, to be entirely settled, that upon appeal there exists no right to review the rulings of the judge or the charge or instructions to the jury, if no exceptions were taken, and the aggrieved party made no objection where he had the opportunity to do so. This disposes of the present case so far as relates to the judge's charge.

It is urged by the first assignment of error that "the court erred in not granting a new trial," referring, of course, to the grounds of the motion therefor.

In examining the testimony upon the trial, as given in the record, we do not find that the damages are excessive. It was claimed in the motion for a new trial that the note in suit was payable in Confederate notes, and that the verdict was for the amount due upon the note in United States currency. The evidence shows that the consideration of the note was a sale of property made before the late war in the States, the present note having been substituted for and in place of a prior note. There was no conflict of testimony as to this fact. Neither do we find that the verdict was against the law and the evidence, or the weight of evidence, nor against the charge of the court.

There was an allegation in the defendant's answer that the plaintiff agreed to take Confederate States notes in payment of the promissory note, and that, though the Confederate notes were tendered soon afterwards, plaintiff refused to take them in satisfaction of his note. The defendant swears to the facts as stated in his answer, and the plaintiff contradicts him as to the agreement. If the answer sets up a defence in form and substance, there was merely a question of veracity between the parties, which was properly submitted to the jury and decided by them. If the answer does not set up a valid defence, the issue was not material. We can only leave this matter where the jury have placed it.

A further ground of the motion for a new trial was that one of the jurors had said to an affiant that he "knew nothing about the case, but found for plaintiff Godwin." There was no other evidence of improper conduct by the juror. He was not shown to have acted improperly or corruptly, and we cannot regard the remark said to have been made by him as necessarily implying that he had acted corruptly. No importance should be attached to remarks made by men who have served on juries when replying to questions of inquiry into the private deliberations of the jury. Whether this juror intended to say that he had forgotten the testi-

mony, or that he did not understand it, or that he corruptly ignored it, or merely to give his questioner to understand that the verdict was not a subject of further discussion, is not very clear. The presumption, therefore, is in favor of the probity of the juror.

The prevailing rule of law is that the affidavits of jurors, as to their conduct and deliberations in the jury room, are not received for the purpose of impeaching their verdict. Vaise vs. Delaval, 1 T. R., 11; Owen vs. Warburton, 1 N. R., 326; Straker vs. Graham, 4 Mee. and W., 721; Dana vs. Tucker, 4 Johns. R., 487; 4 Binney, 150; 3 Marshall, 394; 2 Halst., 46. And the court will not, on a motion for a new trial, receive the affidavit of a party, or his attorney, or third persons, as to *what was said* after the trial by jurors in regard to their conduct, or the manner of arriving at their verdict. Harding vs. Hewitt, 8 Dowl. P. C., 598; Straker vs. Graham, 4 Mee. and W., 721; 7 Dowl. P. C., 721; Aylett vs. Jewel, 2 W. Black., 1299; Clark vs. Stevenson, 2 W. Black., 803; Smith vs. Cheetham, 3 Cai. R., 57, per Kent, C. J.

The court, therefore, committed no error in overruling the motion for a new trial. The judgment must be affirmed with costs.

PITTMAN'S ADMINISTRATOR, PLAINTIFF AND RESPONDENT, VS. REBECCA L. MYRICK, DEFENDANT AND APPELLANT.

1. An appeal will not be dismissed on account of the failure to file an assignment of errors within the time appointed, if the assignment be filed before the motion is determined and the appellant comply with such terms as may be imposed by the court.

2. Where there is a judgment against two parties, and the bond or under-

taking describes the judgment as a judgment against one only, this is a ground for a motion to dismiss the appeal.

3. When a notice of appeal has been given in good faith, and the appellant has failed, by mistake, to give the necessary security in order to perfect the appeal as required by the Code, and these facts are shown to the satisfaction of the court, the appellant will be allowed to perfect the appeal by giving the necessary security.

4. The time for serving and settling exceptions, under the Code, may be enlarged by the court or judge.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

W. H. Milton and *D. L. McKinnon* for the motion.

Geo. S. Hawkins and *J. F. McClellan, contra.*

THE CHIEF-JUSTICE delivered the opinion of the court.

Respondent recovered a judgment against Mrs. Myrick, appellant, and one Joseph W. Russ, in an action upon a money demand, commenced under the Code of Procedure.

The respondent now moves to dismiss the appeal upon the grounds—first, that the assignment of errors was not filed within the time prescribed by the rules; second, that no sufficient bond or undertaking was given by appellant; third, that the order and exceptions were not stated and settled within the time prescribed by law, but after the time had expired, under an order of the judge, at chambers, enlarging the time.

As to the first ground of the motion, we simply remark that the failure to file the assignment of errors within the time appointed has never been regarded as ground for dismissing an appeal, where the assignment is filed before the motion is determined. The delay, however, affords sufficient cause for giving time to the defendant in error to pre-

pare for the argument of the cause if he desires it, and the court may impose other terms.

In respect to the second ground, the record shows a judgment in favor of the plaintiff against the appellant and J. W. Russ for a sum of money. There are two notices of appeal. The first correctly describes the judgment by naming the parties, and the second, served some twenty days afterward, refers to a judgment against Mrs. Myrick only. The undertaking describes the judgment as being against Mrs. Myrick only. The record shows a judgment against her and Russ jointly. It is clear, therefore, that the undertaking filed does not refer to the judgment described in this record; and an affirmance of this judgment is not within the contemplation of the recital of the undertaking, another and different judgment being clearly described. No sufficient bond or undertaking, therefore, was given. This precise question was determined in Salterwhite vs. State, 28 Ala., 69; Dumas vs. Hunter, ib., 688; McGarrah vs. Birney, 4 Tex., 287; and similar questions were decided in Burdine vs. Mustin, 33 Ala., 634; Curry vs. Hinman, 3 Gilman, 90; Willenborg vs. Murphy, 40 Ill., 46.

The third ground of the motion, that the exceptions were not settled by the court but by the judge, after the time fixed by the rules had expired, is not sustained. The record shows that though the time fixed by the rules for serving notice of the filing of the exception had passed, the judge made an order, in vacation, after the expiration of the time, enlarging the time for giving notice and settling the exceptions, and this order was based upon affidavits of the counsel having charge of the case showing grounds which the judge considered sufficient.

It was within the power of the court under section 124, and of a judge of the court under section 337 of the Code of Procedure, to make an order enlarging the "time within

which any proceedings in an action" may be had, except an appeal, "upon affidavit showing grounds therefor."

It was held in New York, in Sheldon vs. Wood, (14 Howard, 18, and 14 Abb., 228,) that the Code,containing similar provisions, "authorizes the allowance of exceptions *nunc pro tunc,* after the ten days for filing them have expired."

It is deemed that the first and third grounds of this motion are not sufficient, but the second ground is sustained, and unless a sufficient undertaking be given the appeal must be dismissed.

Whereupon at another day came the appellant, by her counsel, and read and filed the affidavit of Geo. S. Hawkins and James F. McClellan, Esquires, and made her motion that she be allowed to amend by filing an undertaking which shall be good and sufficient to perfect her appeal, for causes stated in said affidavits and shown to the court.

BY THE COURT:

By the late Code, Sec. 269, "any party aggrieved may appeal." The N. Y. Code, Sec. 325, is precisely like ours. In Mattison vs. Jones, (9 How. Pr. R., 152,) it was held that any one of several parties conceiving himself aggrieved may appeal, whether his co-plaintiff or co-defendant join in the appeal or not.

This appeal is by Mrs. Myrick alone, the judgment being against her and Russ. The notice of appeal first served, and which does not seem to have been withdrawn, conforms to the judgment, and seems to have been regularly served. The only question relates to the security.

It appears by the affidavits of the counsel for Mrs. Myrick that the notice of appeal was given in good faith, and they state facts which go to show that they supposed the judgment was against Mrs. Myrick only, and hence, in drawing up the undertaking, committed the error involved by mistake

and inadvertence, for which Mrs. Myrick is in no wise responsible.

By the same paragraph of Section 271 of the Code, it is provided that "when a party shall give in good faith notice of appeal from a judgment, and shall omit through mistake to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just."

This directly includes the security to be given on appeal, and this application is therefore addressed to the discretion of the court. Upon an examination of the record, and the affidavits tendered upon this motion, we are satisfied that the appellant has in good faith given the notice of appeal, and that the failure to give the requisite security was the result of inadvertence.

Therefore, upon reading and filing the affidavits of George S. Hawkins and J. F. McClellan, it is ordered that the appellant have thirty days from this date to procure and file in the office of the Clerk of the Circuit Court for Jackson county an undertaking, as required by Section 278 of the act of February 19, 1870, known as the Code of Procedure, executed by good and sufficient sureties, who shall justify as to their responsibility, and whose sufficiency shall be subject to exception and justification, as prescribed in said Code of Procedure; and the filing of such sufficient undertaking shall operate as a stay of proceedings, as against the appellant, upon the judgment appealed from. And in the meantime it is ordered that all proceedings under said judgment be stayed thirty days from the date hereof.

It is further ordered, that the appellant may perfect her appeal by filing with the said Clerk of the Circuit Court an undertaking, as prescribed by Section 277 of said Code, with sufficient sureties, provided the appellant does not desire a stay of proceedings upon said judgment.

Ordered further, that after said undertakings, or either of

them, shall be filed, and the sufficiency thereof established, a certified copy thereof and of the evidence of its sufficiency or approval annexed, shall be filed with the clerk of this court.

HAYS' ADMINISTRATRIX, PLAINTIFF AND RESPONDENT, VS. ADAM MCNEALY, DEFENDANT AND APPELLANT.

The rule requiring that the Judge presiding at the trial shall settle the case on exceptions, does not control where, at the time the case is to be settled, such Judge has resigned. Public duties, upon which depend private rights, do not pass away with the official existence of the Judge resigning, and the duty of settling a case on exceptions devolves upon his successor. In exercising such power this Court must presume that he acted upon reliable information.

Appeal from the Circuit Court for Jackson county.

This is an action brought under the Code by respondent against the appellant. The case was tried in the Circuit Court at Fall Term, A. D. 1875, while the Hon. W. W. VanNess was Judge of the First Judicial Circuit, embracing Jackson county. There was a verdict for the respondent. The appellant, McNealy, moved for a new trial. Judge VanNess held this motion under advisement, and on the 28th day of March, 1877, filed an order denying it. McNealy, the appellant, who had excepted to rulings of the judge upon the admissibility of testimony and other points. excepted to the order denying the motion, and presented a case and exceptions to Judge VanNess on March 31, 1877. The respondent offered amendments to the same. Judge VanNess resigned before he had settled the case and exceptions, and the Hon. A. E. Maxwell was appointed his successor. Afterwards, on the 17th day of July, A. D. 1877. Judge Maxwell settled the same as amended. The respon-

dent moved to dismiss the appeal on the ground stated in the opinion of the court.

Geo. S. Hawkins and *J. F. McClellan* for the motion.

C. C. Yonge and *W. H. Milton, contra.*

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The motion is to dismiss the appeal upon the ground that the case and exceptions were not settled by the judge before whom the cause was tried. The case and exceptions were settled by his successor in office, the judge before whom the case was tried having gone out of office. It is contended that this act of the succeeding judge was without authority and void; that there is no case or exceptions, and that for this reason the appeal should be dismissed. The proper motion here would be to strike from this record what purports to be a case and exceptions, because these are circumstances under which errors, apparent upon the record other than those embraced in the bill of exceptions, may be considered. Without reference to this distinction, however, the court will consider the question as presented. It is true, that the letter of the rule requires that the judge trying the case shall settle the case and exceptions, but this rule must be held to control absolutely only in cases where it is applicable, that is, to cases where the judge who tried it is still in office. At the time this bill was signed and settled there was in existence no such officer as the judge who tried the case. A state of circumstances had arisen to which the rule was not applicable. This rule not covering the case, the question is, what is the rule of law applicable to the changed circumstances, and where was the power to settle the case or exceptions to be found? or was this power and duty restricted solely to the judge presiding at the trial? It is a general rule that public duties and public powers upon

which depend the enforcement of private rights, do not pass away with the official existence of a person in whom they may be vested as an officer.

The general right here is to appeal, and the settling of the case or exceptions is a part of the method by which he is to exercise his general right. Without entering into an elaborate discussion of the subject, we will simply refer to the cases covering the general question.

The case of the Life and Fire Insurance Company of New York vs. Wilson's Heirs, 8 Peters, 292. In this case Judge Robinson, of the District Court of the United States, Eastern District of Louisiana, at May term, 1826, had rendered a final judgment. He did not sign the judgment, although he held three terms afterward. He died in autumn of 1828. His successor declined to sign the judgment. The Code of Louisiana provided that "the judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given." A rule to show cause why a mandamus should not issue commanding his successor to sign the judgment was awarded by the Supreme Court of the United States. In reply to this rule the judge set up the fact that he did not render the judgment, and that the judgment was rendered by another judge long anterior to his accession to office. It will be noted that the letter of this statute, like the letter of the rule in this case, contemplated that the judge rendering the judgment should sign it. The Supreme Court of the United States awarded the mandamus, remarking, "the court remains the same, and the change of the incumbents cannot and ought not in any respect to injure the rights of litigant parties."

The Supreme Court of Indiana, in the case of Smith vs. Baugh, (32 Ind., 163,) held that after the expiration of his term of office, the judge presiding at the trial could not sign a bill of exceptions; and in the case of Ketchum, admx., vs.

Hill, (42 Ind.,64,) the same court held that "the successor in office of such judge has full power to sign a bill of exceptions embodying the evidence," and that the court was "bound to presume that in exercising such power he acted upon reliable information." The like rule prevails in most of the States.

The motion is denied.

HAYS' ADMINISTRATRIX, PLAINTIFF AND RESPONDENT, VS. ADAM MCNEALY, DEFENDANT AND APPELLANT.

1. Judicial power and jurisdiction is not in its nature exclusive. The general rule is that like judicial authority is possessed by different Courts, and a grant of jurisdiction to one Court, even if it be of the same character as that possessed by another, does not repeal the first grant but renders the tribunals in which is vested Courts of concurrent, not of exclusive, jurisdiction. Applying this principle to the act of 1844, vesting jurisdiction in the Circuit Courts to sell lands belonging to intestate estates to pay debts, it does not repeal an antecedent law vesting a previous like authority in the Judge of Probate.

2. Where the verdict of a jury is contrary to the law of the case, as applied to the facts admitted and as to which no question of credibility is involved, the verdict must be set aside.

3. Where the jurisdiction and power to hear a case depends upon the existence of a fact, that fact must be alleged or appear, or the proceedings are *coram non judice* and void. The act of 1833, under which the proceedings in this case were had, authorized the Judge of Probate to order a sale of real estate to pay debts *"after exhaustion of personal assets."* This exhaustion was a fact potential for the jurisdiction of the Court. Without it the proceedings were void.

4. Under the grant of jurisdiction to the Judge of Probate in the Constitution of 1865, there was no original or inherent power in him to sell lands to pay debts. Lands were not assets until so declared by the Legislature. His power was conditional, is derived from legislative grant, and is a donation of special and limited jurisdiction.

Appeal from the Circuit Court for Jackson county.

This was an action brought under the Code by the respondent against the appellant, McNealy, and another. The respondent recovered judgment in the Circuit Court against the appellant for the sum of $980.90 and costs, and from this judgment the appellant appealed. The other facts necessary to an understanding of the case are stated in the opinion of the court.

C. C. Yonge and *W. H. Milton* for Appellant.

Geo. S. Hawkins and *J. F. McClellan* for Respondent.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This action is upon a promissory note given for land sold by an administrator, under an order of a Judge of Probate. A recovery is resisted upon the ground that the sale was void, that there was no consideration. The sale was had under the act of 1833, (Thomp. Dig. 202,) and the position taken here is that this act is repealed by the act of 1841, (Thomp. Dig. 203.) It is claimed that the question is settled by adjudication in the cases of Gilchrist vs. Filyau *et ux.*, 2 Fla., 94, and Union Bank vs. Powell's heirs, 3 Fla., 175. The question in the first case was whether an action of debt could be sustained in this State against the heir upon the bond of the ancestor. The ancestor was a surety upon a guardian bond. The decision of the question in no manner depended upon the repeal of the act of 1833. The court placed its conclusion upon the broad ground that lands were assets in this State. This was so under the one act as well as the other, and repeal was not a question involved in the controversy. The validity of no proceeding for the sale of lands under the act of 1833 was in question, and whether the act of 1841 changed the mode of sale authorized by the act of 1833 was not a question in

the case. It is also true as to the case of the Union Bank vs. Powell's heirs, 3 Fla., 175, that this question was not involved. The remark of the court in these cases, as to a change of "the mode" by which administrators may sell real estate for the payment of debts, was, therefore, mere *obiter;* and upon principles universally recognized it is our duty to examine the question as *res integra.*

The act of 1833 declared lands assets, and *after exhaustion of personal assets,* authorized their sale by order or decree of the Judge of Probate, so far as necessarry to pay debts. The act of 1841 authorized a sale by the Circuit Court when the personal estate was not sufficient for the payment of debts, as well as where an equal, fair and beneficial division could not be made. Its title was "An act to authorize executors and administrators to sell real estate in certain cases, and to repeal certain acts therein mentioned." Acts of 1841, page 39. The act of 1833, then an existing act upon the same general subject, is not mentioned in the repealing clause. The question presented, therefore, is whether an act in 1841, vesting jurisdiction in the Superior Court to sell lands to pay debts upon an allegation of insufficiency of personal assets to pay debts, repeals an act of 1833 vesting power in Judges of County Courts to sell land *after exhaustion of personal assets,* the act of 1841 having specific clauses repealing other acts, vesting like but other powers in the County Courts, but omitting any mention of the act of 1833.

The subject here acted upon by the Legislature is the jurisdiction of courts, and looking to the repeated expression of opinion by the Supreme Court of the United States and the several State courts as to the nature and character of jurisdiction, there is nothing in it which renders it inconsistent or exclusive. The rule may be stated to be that jurisdiction is concurrent, not exclusive. The exception is where it is exclusive. Looking to the organiza-

tion of our own State system, we find an investiture of like jurisdiction in several distinct courts. Our Supreme Court has in some instances concurrent jurisdiction with the Circuit Court, and it is only necessary to refer to our books of reports to find repeated instances of concurrent jurisdiction in the Circuit and County Courts. In the matter of judicial jurisdiction even in the State and Federal Governments, there are many cases of concurrent powers. 1 Kent Com. 426 to 446. The grant of jurisdiction to one court, without words of exclusion as to other courts having like powers, simply constitutes each tribunal courts of concurrent jurisdiction. Says Bronson, Justice, speaking for the Court of Errors of New York, (2 Hill, 164,) a grant of jurisdiction is not like a grant of property, which cannot have several owners at the same time. There is, I think, no instance in the whole history of the law where the grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. The authorities are abundant, but it is certainly unnecessary to say more upon this subject, and especially is this true when the repealing clause of the last act in this case, although repealing other acts giving power to the County Courts, omits any mention of the act of 1833; and when the power granted in the first act is in case of *exhaustion of personal assets,* and in the subsequent act the power is granted *when the personal estate is not sufficient to pay debts.* The act of 1833 was not repealed. We have examined elaborately and carefully the several assignments of error herein made, so far as they are presented for consideration by the record, but it is unnecessary to refer to any question except that of the jurisdiction of the Probate Court in this proceeding.

One of the grounds of the motion for new trial, properly presented for our consideration herein, is that the verdict was contrary to the law and evidence. The defendant is

sued as the maker of a note given in consideration of land sold under an order of the Probate Court upon application of an administrator. He pleads a want of consideration in this that such sale was void. There is issue of fact upon this plea. If, therefore, under the evidence it is plain and clear that there was no jurisdiction, then the sale was void, and the verdict should have been for the defendant.

The petition filed by the administratrix, upon which these proceedings were based, contains the allegation "that the assets belonging to the estate of the intestate are wholly insufficient to pay the debts due and owing by the said James Hays, deceased, that had been presented to her, and that in order to pay and discharge the debts it is necessary to sell the real estate belonging to said estate." This statement, that the assets (embracing as they do both real and personal estate in this State) of an estate are wholly insufficient to pay debts due, is rather a suggestion of insolvency than an allegation that "the personal estate of the intestate is not sufficient for the payment of debts," or that "the personal assets are exhausted." There is no pretence in this case that the proceedings necessary to give validity in case of sales of real estate belonging to insolvent estates have been had. The question here simply is, whether an allegation in a petition, "the assets are insufficient to pay debts, and that in order to pay debts it is necessary to sell the real estate," is sufficient to give the court jurdiction of a case where it is authorized "to sell real estate *after the personal estate is exhausted.*"

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action, if the petitioner states such a case in his petition that on a demurrer a court would render judgment in his favor, it is an undoubted case of jurisdiction." 6 Pet., 709-729.

In order to give jurisdiction of the subject-matter, this pe-

tition for the sale should have set out, either in words or substance, that the personal estate was exhausted. This fact at least should appear from the record. This was a jurisdictional fact necessary to be alleged or to appear in order that the court could authorize the sale by the administrator. (2 How., 338; 18 How., 502; 6 Porter, 262; 28 Ala., 164; 26 Ill., 179; 3 Ohio State, 494; 29 Ala., 210; 1 Neb., 56-70; 2 Wall., 216; 3 Wall., 403; 41 Ala., 39-48; 1 Ala., 475; 6 Porter, 219; 10 Ala., 636.) Our general view as to the nature of proceedings of like character to this will be found in Price vs. Winter, (15 Fla., 103,) and we deem it unnecessary to repeat here what is there said.

What has been said disposes of this question, unless there is something in the grant of jurisdiction to the judge of probate under the Constitution of 1865 which saves it from the operation of this principle.

The Constitution of 1865, Article V., Sec. 1, provided that "the judicial power of this State, both as to matters of law and equity, shall be vested in a Supreme Court, courts of chancery, circuit courts, and justices of the peace; *Provided,* The General Assembly may also vest such civil or criminal jurisdiction as may be necessary in corporation courts and such other courts as the General Assembly may establish; but such jurisdiction shall not extend to capital cases." It also provided (Art. V., Sec. 8,) that "there shall be elected in each county of this State, by the qualified voters, an officer to be styled the judge of probate, to take probate of wills, to grant letters testamentary, of administration and guardianship, to attend to the settlement of the estates of decedents and minors, and to discharge the duties usually appertaining to courts of ordinary and such other duties as may be required by law, subject to the direction and supervision of the circuit courts as may be provided by law." It is thus seen that the power to attend to the settlement of estates of decedents, and to discharge the duties usually ap-

pertaining to courts of ordinary, as special powers granted by the Constitution to *an officer* to be styled the judge of probate. All of this, as a matter of course, was subject to action of the Legislature prescribing the method of settling such estates and discharging such duties. We do not propose here to enter into any general discussion looking to distinctions between courts of superior and general jurisdiction, and inferior or special and limited jurisdiction. We restrict ourselves to the precise question, and that is as to the constitutional grant of power so far as it concerns the real estate belonging to intestate estates, for a court may be a court of general jurisdiction for one purpose and special jurisdiction for another.

We are clear that this constitutional grant of jurisdiction did not invest the judge of probate with power to treat the real estate of intestate estates *as assets applicable to the payment of debts*. We are also clearly of the opinion that there is in the judge of probate no inherent original power of this character as to real estate, and this whether he is viewed strictly as an "officer" invested with special powers judicial in their character, or as the presiding officer of a court of limited and special jurisdiction under legislative grant. At common law, and under the English system, the spiritual courts had no jurisdiction over real estate or its proceeds, nor did the administrator have any title to the lands. Upon the death of the ancestor the fee vested in the heir. Under the constitutional grant, therefore, of power to settle estates, neither the judge of probate nor the administrator had any control over the real estate of the decedent, and, as at common law, real estate was not assets, and courts of ordinary of other States could not and did not treat it as assets, except through local legislation so declaring. It is evident that, independent of legislation in this State declaring land assets, it could not be the subject of sale to pay debts upon application by an administrator to the judge of probate. It

is thus apparent that all of the power of the judge of probate in 1866 to sell this real estate resulted from legislation declaring it assets, and giving him a special and limited power to authorize an administrator to sell it. He could only authorize its sale *"after exhaustion of personal assets."* Until this exhaustion happened, there was no jurisdiction or power in him to act. Until this happened, the administrator, viewed in reference to the probate court or judge of probate, had no interest in them but a naked authority to sell after he had exhausted the personal assets. The title was in the heirs, subject to be divested only by their voluntary act, or the decree of a court of competent jurisdiction, and the jurisdiction or power existed only upon the happening of the event stated. This was the primary fact that was potential for its jurisdiction. Without it what was done was void. *In this case the petition shows affirmatively that no such fact was even alleged.* The judge of probate had no constitutional or inherent power over land for this purpose. His power was conditional, is derived from legislative grant, and is a donation of special and limited jurisdiction.

Judgment reversed and new trial awarded.

JAMES P. COKER, PLAINTIFF AND APPELLANT, VS. MERRITT'S EXECUTOR, DEFENDANT AND RESPONDENT.

1. It is within the discretion of the Court to rule out any improper evidence which has been admitted in the progress of a trial, before the closing arguments of the counsel.

2. Under Section 28 of "An Act relating to Jurors," approved August 1, 1868, the Court is to determine the necessity of a view by the jury of "the premises or place in question," and having exercised a sound discretion in denying a motion for such view, this Court will not interfere.

3. To authorize a Court to grant a new trial upon the ground of newly discovered evidence, the party must show that the evidence has come to his knowledge since the trial; that it is not through the want of diligence that it did not come to his knowledge sooner, and that it is not cumulative, but relates to facts upon which there was, on his part, no evidence on the trial complained of.

4. When it is alleged as error that certain undue influences were brought to bear upon some members of the jury to prejudice or mislead them, or to influence them to find for a party, the misconduct or irregularity so complained of upon the part of the party or the jurors, must be satisfactorily proven.

5. A verdict will not be set aside when the evidence is conflicting, unless it is apparent that the jury have been actuated by some improper motive.

Appeal from the Circuit Court for Jackson county.

This is an action under the Code.

The complaint of the plaintiff alleges that on the 11th of March, 1869, he was seized and possessed of certain premises in Jackson county, on the "Blue Spring creek," upon which was a grist mill, propelled by the water of said creek, and running two sets of stones or runners, and employed in grinding grain for the public for toll; that the mill and water power was susceptible of being used for operating other machinery, and that the plaintiff had long contemplated the employment of such water power to its full extent; that the defendant, on the 7th day of December, 1871, purchased of Jonathan Pelt, and some time thereafter from William Taylor, a tract of land about two miles below the plaintiff's mill, on said "Blue Spring creek," upon which there was a mill-race, and operated by the said Pelt and Taylor; that since the purchase of such mill by the defendant he has raised and flooded back the water of said "Blue Spring creek" upon the land and mill of the plaintiff twelve to twenty inches, to injury of the plaintiff two thousand dollars; that such back-flow of water upon his land and mill

has permanently injured the value of the water power and privilege to the extent of five thousand dollars.

The plaintiff further complains, that about the 1st of November, 1872, he had verbally sold to one S. M. Dunwoody the one undivided half interest in his said mill and water power for the sum of twenty-five hundred dollars; that the defendant sought an interview with the said Dunwoody, and represented to him that if he bought an interest in said mill and water power he, the defendant, would flow that water back so as to drown the said mill out and render it valueless; that from such representations Dunwoody was deterred from completing such purchase; that by reason thereof plaintiff was damaged in the sum of twenty-five hundred dollars. Plaintiff prayed judgment for the injuries to the amount of nine thousand and five hundred dollars, and costs.

The defendant, in substance, denies all the allegations in the complaint, and on the contrary alleges that from the fact of the weakness of his dam he has kept the water from eight to twelve inches lower than it was kept by Pelt and Taylor, and two and a half feet lower than a water mark which the defendant alleges had been fixed upon by Danelly and Sims, previous owners of plaintiff's mill site, and through whom he claims plaintiff derived title; that his mill was built long anterior to that of plaintiff; that plaintiff bought with full knowledge of defendant's rights; that he has never raised the water of the creek an inch higher than is necessary to run his mill; that defendant believes that if the water of the creek is thrown back upon the plaintiff's mill, there are other causes than the action of defendant as to the use of the water of the creek or the effect of his dam.

The defendant further alleges, that the mill and dam of defendant were built upon the present site, and the waters of the "Blue Spring creek" were used by Pelt and defendant, claiming under him, for more than seven years before the institution of this suit, and that said waters were not

flowed back by said Pelt to the same and greater height than now; that the dam of defendant and the water power created thereby were and have been, during all the time above mentioned, held and enjoyed by said Pelt and Taylor and this defendant, and claiming title thereto adverse to the plaintiff and all other persons, and during all that time for the propulsion of said mill without hindrance or molestation from the persons owning or occupying the mill of plaintiff and premises, as set forth in the complaint.

Subsequently, two amended answers were filed, both of which were demurred to by plaintiff's counsel. The demurrer to the first amended answer was sustained, while that to the second was overruled. No question of error being raised upon either of them, they are omitted. Before the cause came on to be tried E. J. Merritt died, and his executor, Alex. Merritt, was substituted as the defendant.

The cause was tried by a jury at the June term, 1876, who found for the defendant. A motion for new trial was made and denied by the court, whereupon judgment was entered against the plaintiff for costs. From this judgment the plaintiff brings his appeal.

J. F. McClellan for Appellant.

W. H. Milton for Respondent.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action brought under the Code of Procedure, and was tried at the June term, 1876, of the Circuit Court held in Jackson county, in the First Judicial Circuit.

The first error alleged is that "the court erred in ruling out and instructing the jury to disregard the evidence of John A. Malambre." The record recites simply that "the depositions of John A. Malambre were read. He said, I

heard Erthington I. Merritt say that he would flow back the water of Blue Spring creek upon the mill of James P. Coker and drown his mill out. This was in 1873. After the deposition was read to the jury the defendant moved to rule it out on the ground that it referred to declarations of Merritt after the suit was brought, and the court, upon that ground, ruled out the whole deposition, to which ruling the plaintiff excepted by his counsel." No other portion of the deposition of Malambre appears any where in the record, and for the purpose of passing upon this alleged error, the court must take the matter so recited as the whole of the evidence of such witness, under a commission, which we must infer was issued.

The action was commenced by the filing of a complaint on the 23d day of November, 1872, and was brought to recover the damages sustained by plaintiff by reason of the alleged injuries received from the defendant previous to that time. The evidence relates to a conversation held with the defendant in year 1873, and consequently must have been long subsequent to the commencement of this action. If the court had permitted the evidence so introduced to have been considered by the jury, it could have had no weight with them in coming to a conclusion upon the facts as they existed at the commencement of the action; and those were the only facts they were sworn to pass upon. It was irrelevant to the issue, and irrelevant matter may be very properly excluded from the jury. It having been read, perhaps, inadvertently to the jury, the motion to rule out was properly granted by the court. The evidence was calculated to mislead the jury, and it would have been error in the court to have received it under an objection upon the part of the defendant. If of any value whatever, it could only be used in a separate action for damages arising subsequent to the commencement of the action then under trial. It is within the discretion of the court to rule out such evidence which

has been admitted at any time during the progress of the trial, but such ruling out should take place before the closing arguments of the counsel. Judge of Probate vs. Stone, 44 N. H., 593.

The second error now assigned is "that the court erred in not permitting the jury to go and view the premises."

Upon the close of the evidence, the plaintiff moved the court hat the jury be allowed to go and view the mills of the plaintiff and defendant, and all the localities connected with them that were involved in the issue, offering at the same time to pay the expenses of thus making such view. This motion and offer are made under Section 28 of "An act relating to jurors," approved August 1, 1868, which is in the following language: "The jury may, in any case, at the request of either party, be taken to view the premises, ro place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to give a just decision, provided the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view," &c.

The court, in the exercise of its power, and in view of the evidence which had then been closed, and after hearing read an affidavit by the defendant from which it appeared that since the commencement of this action he had erected a new mill upon the site of the old one, and had raised the dam to a height sufficient to hold five feet of water, and that the status of the mill and property had thus been materially changed, denied such motion.

The jury upon such view would not have found the facts existing towards which the evidence had been directed. The mill of the defendant had been rebuilt, a saw mill had been added thereto, the dam of the mill had been raised, and the entire nature of the mill property had been materially affected and changed, as appears by the affidavit which is

brought up by the record. The court below was the proper judge of the necessity of such view by the jury, and having exercised his discretion in denying the motion, this court will not reverse his judgment thereon.

The third error assigned is "in not granting a new trial, upon the ground of newly discovered evidence."

Upon the hearing of the motion on the part of the plaintiff, that the jury be permitted to view the premises, the defendant, in opposition thereto, made his affidavit—the substance of which is stated before—"that the dam of said mill has been raised to a height sufficient to hold five feet head of water, in place of the old head of water." This is claimed to be the newly discovered evidence upon which the plaintiff asked for a new trial. If the plaintiff had been aware of the fact, as stated in the affidavit, at the time of the trial, we cannot see how he could have availed himself of it. The dam was raised after the commencement of the action, and no proof of that fact could have been legally given to the jury. Had a new trial been granted, he could not have benefited himself by a knowledge of the fact that the water had been thus raised to the height of five feet. The damages sought to be recovered are alleged to have occurred anterior to the time when this new dam was erected. But supposing it was evidence which might properly be used upon a new trial, can it be said to have been newly discovered evidence? The fact existed previous to the time of the commencement of the trial of the cause, and Alexander Merritt was examined therein as as a witness. It cannot be said that the plaintiff who owns the mill near by on the stream and within three miles, and who complained of being damaged by the back flow, was not aware of this new erection of mill and dam. The court, in order to be authorized to grant a new trial upon such a ground, should be satisfied that the evidence claimed to be newly discovered could not have been obtained for use on the

prior trial by diligent inquiry. It will not answer for a party to go to trial unprepared, and if unsuccessful, rely upon getting back into court upon the ground of newly discovered evidence, when by mere observation or inquiry that evidence might have been obtained. Then, too, the evidence would only have been cumulative. There was much evidence as to the height of the water in the pond, and the effect it had on the plaintiff's mill. That was the issue. To enable a party to procure a new trial upon the ground of newly discovered evidence, such evidence must touch a fact upon which there was, on his part, no evidence on the trial complained of; not simply cumulative, sustaining the proof already introduced as to certain other facts.

In Sharp and Brown vs. Loylers, 39 Ga., 678, the court says: "To entitle a party to a new trial on the ground of newly discovered evidence he must show—first, that the evidence has come to his knowledge since the trial; second, that it is not owing to any want of diligence on his part that it did not come to his knowledge sooner; third, that it is so material that it would probably produce a different result if the new trial should be granted; fourth, that it is not cumulatively only—that is, it must relate to facts of which there was no evidence on the trial complained of."

The fourth error assigned is, "that the jury were labored by the defendant."

We understand this to mean that certain influences were brought to bear upon some of the jurors to prejudice or mislead them, or to corruptly induce them to find for the defendant. To support this alleged error upon the motion for new trial, the plaintiff introduced first his own affidavit, in which he swears, "That he is informed and believes that some of the jurors in this case have been labored by the defendant and his friends; that the defendant has, during the trial of this case, cared for the horses of the jurors, John P. May and S. R. Barnes, by putting them up in his stable

and caring for them while on the jury; and that defendant did other acts calculated to influence some of the jurors, such as inviting them to his store, extending them many and marked attentions, and the same was exhibited on the part of his friends, and he believes that these acts did influence some of the jurors as to their verdict." Also says upon this point in such affidavit: "That Emanuel White, one of the jurors, revealed the verdict of the jury before, it was announced in court, to one Norflet White; that he is informed and believes that H. B. Grace, a warm friend of the defendant, did, by association and clandestinely, influence one or more of the jurors sitting in this case; that he is informed and believes that since the rendition of this verdict the defendant has been treating the jury, if not ale, to whisky, and passing with them, he and there,a general congratulation of their safe delivery of him from this cause."

Another affidavit was read in support of this motion, upon the part of the plaintiff, made by Major J. Carraway, by which it appears that the affiant had, for several years, "known Augustus B. Connor, or O'Connor; that on or about the third day of the trial of the case of James P.Coker vs. Alexander Merritt, as the executor of Erthington I. Merritt, deceased, he asked Augustus B. Connor, who was a juror on said case at the late term of Jackson Circuit Court, how he thought the case was going? He replied that he did not know exactly, but he thought in favor of Merritt; that the affiant is 21 years old on the 14th day of August next; that he has talked with the juror, Augustus B. Connor, and that, from talking with him,he has ascertained that he is about one year older than affiant."

On the hearing of the motion on the two foregoing affidavits, the defendant introduced and read—

First. The affidavit of Augustus B. O'Conner, the juror mentioned in the last preceding recited affidavit, who swears that the language inputed to him in such affidavit

made by Major J. Carraway is entirely false; that he was twenty-two years old on the 20th day of the March then last past, and that he was registered as a citizen of the said county prior to his being summoned as a juror.

Second. The affidavit of S. R. Barnes, one of the jurors, who swears that the allegation of plaintiff in his affidavit, "in which he states the defendant cared for his horse by putting him up in his,defendant's, stable and caring for him, is not true; that he requested permission of defendant to put his horse in a vacant lot in order to feed him and not keep him tied up all day, and that he, affiant, furnished his own corn and fodder." This affiant further says, in the course of his affidavit, "that the plaintiff had his, affiant's, horse put up at the livery stable in Marianna one night during the trial."

Third. The affidavit of H. B. Grace, who swears that the allegations contained in the plaintiff's affidavit against him are untrue in every respect; that "he never attempted by word or deed to influence the jury either for the plaintiff or defendant."

Fourth. The affidavit of Emanuel White, one of the jurors in the cause, who swears that the allegations in the affidavit of the plaintiff, that this affiant "revealed the verdict of the jury before it was answered in court to one Norflet White, is untrue."

Fifth. The affidavit of John P. Mayo, one of the jurors, and named in the plaintiff's affidavit, states that the defendant "did not care for his horse by putting him up in his, defendant's stable, neither did he feed his said horse as alleged in plaintiff's affidavit; that affiant, not desiring to keep his horse tied up all the time, and not being able to put his horse at the livery stable, did put him in a vacant lot of defendant's, but he, affiant, furnished his own feed for his said horse;" that defendant neither by act nor word at-

tempted to influence his judgment in this case, pending or before trial.

Sixth. The affidavit of Alex. Merritt, the defendant, who swears "that he has not labored any of the jurors in this case, either by giving them, the jury, any personal attention, nor has he cared for any of the horses of the jury that tried the above case;" that John P. Mayo and S. R. Barnes, who were jurors, once or twice put their horses in a vacant lot of defendant's, but this defendant did not have their horses fed or have them put up in his stables, neither did defendant by any act attempt to influence them by inviting them to his store; that defendant keeps store in Marianna, and treats any one politely that enters, and is not aware of any extra attention or politeness shown any of said jurors during the trial, and that he never treated any of the jury after the trial."

Had there been no question, upon the showing of the plaintiff that improper influences had been used by and upon the part of the defendant upon the jury to control their verdict, the affidavit read upon the part of the defendant changes entirely the aspect of the case. The rule is well settled that to lay the foundation for the interposition of the court, the misconduct, or irregularity upon the part of the party, or of the jury, must be satisfactorily proved. In the case at bar we cannot say that it was so proved; each and every allegation of misconduct, either upon the part of the defendant or of the jurors so individually charged, is denied, and that too in as solemn and effective manner as it is urged. The weight of the evidence is on the side of the defendants.

The only remaining error relates to the evidence taken upon the trial of the cause: that the verdict is against the weight thereof, and that it could only have been arrived at through bias, prejudice, and mistake, and that it does not reach a substantial or just conclusion.

The issue was one of fact, whether the plaintiff had sus-

tained damage by reason of the injurious and unlawful acts of the defendant; a question peculiarly within the province of the jury to determine, and with which the court had nothing to do. A large number of witnesses were examined both by plaintiff and defendant, thirty-eight in all, as appears by the record. A number of days were occupied in the trial,and the parties were severally represented by able and intelligent counsel. Both the parties to the action were examined as witnesses, and the evidence touching the issues is very conflicting. The judge who presided at the trial of the cause, who saw and heard the witnesses, has refused to grant a new trial upon the ground assigned as error. There is no evidence in the record to warrant the belief that the jury were controlled by any improper motive, or that they were either biased, prejudiced, or mistaken. The trial was fairly conducted, and the verdict was uninfluenced by passion. The evidence was conflicting, and it was for the jury to determine the facts; we will not disturb the verdict. Cameron vs. State, 16 Fla.; Clifford vs. Luhring, 69 Ill., 401; Bishop vs. Busse, ib., 403; Warren vs. Cummings, 37 Wis., 81; Berry vs. Elliott, 25 Ark., 89.

In Miller vs. Balthasser, (78 Ill., 302,) the court say: "The rule is uniform that a verdict will not be set aside when the evidence is conflicting, even though it may be against the weight of evidence, unless it is apparent the jury have been actuated by passion or prejudice."

The judgment is affirmed.

FLASH, LEWIS & CO., PLAINTIFFS IN ERROR, VS. ADNAH C. CONN., DEFENDANT IN ERROR.

Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manfacturing purposes, &c., passed by the Legislature of New York, which provided, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last instalment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers, and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts.

Writ of error to the Circuit Court for Escambia county.

(This case would have been placed among the other *common law* cases decided at this term, but it could not be from the Reporter's inability to procure the briefs of counsel in time.)

The declaration alleges that the defendant, on and before the first day of April, 1874, was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York, under the provisions of the act of the Legislature

of that State, passed February 17, 1848, entitled "an act to authorize the formation of a corporation for manufacturing, mining, mechanical, chemical," &c., purposes, and the various amendments thereof; and that the defendant being such stockholder, and holding $75,000 of stock, or one-fourth of the stock, which was fixed at $300,000; and the said company doing business, and having an agent and office in Escambia county; and the said company being in debt to the plaintiff in the sum of $5000 by promissory note of date September 21, 1874, and the sum of $5,946.20 by another promissory note of date September 21, 1874, and the further sum of $2,646.47 by account stated, the said plaintiffs, on the 16th day of February, 1874, instituted their suit against the said company in the Circuit Court to recover the sums due by said promissory notes and account, and the interest and costs; and on the 15th day of March, 1875, the plaintiffs recovered judgment in said Circuit Court against the said company for the sum of $14,120.50, together with the costs of said suit; that by reason of the said company being adjudicated a bankrupt by the District Court of the United States for the Northern District of New York in 1875, the plaintiffs were prevented from taking any of the property of the said company under execution in satisfaction of said judgment; that upon said judgment execution was duly issued, but returned by the sheriff of said county wholly unsatisfied; that the property of said company has been sold by order of said bankrupt court, and that the proceeds of said sale will not more than pay the costs and expenses of the bankrupt proceedings and of the assignee in bankruptcy, leaving nothing to be applied to the satisfaction of said judgment or to be paid to the plaintiffs and other creditors, and that said judgment has not been and cannot be satisfied, either in whole or in part, out of the assets of said company; that by the provisions of said act of the Legislature of the State of New York, all the stockholders of said company

are severally individually liable to the creditors of the company to the amount of stock held by them respectively, for all debts and contracts made by said company, until the whole amount of capital stock fixed and limited by such company shall have been paid, and a certificate thereof shall have been made, signed, and sworn to by the president and a majority of the trustees, and recorded in the office of the county clerk of the county wherein the business of the said company is carried on; and that the said company failed to comply with the said provisions of said act, and did not, by its president and a majority of its trustees, make, sign, swear to the record such certificate, either in the county of New York, the county in which the operations of said company were, by their articles, to be carried on, and their principal business done, or in the county of Escambia, Florida, in which said company did business, or in anywise as required by said act to exempt defendant; wherefore the said defendant became and is liable to the said plaintiffs for the said debt and said contract made by said company, and the said plaintiffs claim $28,000.

The other facts are stated in the opinion of the court.

E. A. Perry for Plaintiffs in Error.

The General Assembly of New York, by its act entitled "An act relative to incorporations for manufacturing purposes," and by its acts amendatory thereof, authorized the formation of associations or corporations for various purposes, and by Sections 10 and 11, pages 24 to 26, provided how the persons organizing under said act might exempt themselves from individual liability; expressly by those sections providing that such persons, "All the stockholders," should remain severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for

all debts and contracts made by such company until the provisions of those sections should be complied with.

Under said act the defendant, with others in the city and county of New York, associated themselves in the name of the Pensacola Lumber Company, and in that character, and without complying with the provisions of Sections 10 and 11, became indebted to the plaintiffs, and by their notes and drafts, drawn and payable in the city of New York, contracted to pay the sum of about $14,000. The said notes not being paid, plaintiffs brought their suit in the Circuit Court for Escambia county upon said notes, and also upon an open account for goods purchased from plaintiffs by the defendant and associates so doing business in the character aforesaid, in which suit the plaintiffs obtained judgment against the Pensacola Lumber Company for $14,121.51. Upon this judgment execution issued, and the said company having upon its own petition been adjudged a bankrupt, and its property having been sold for barely enough to cover the assignee's costs and expenses, the execution was returned wholly unsatisfied.

To plaintiff's declaration defendant interposed his demurrer, the ground taken by demurrant being that the court had no jurisdiction to enforce defendant's liability; it being contended in argument that the liability was a penalty, and one that could not be enforced by courts other than the courts of the State that enacted the statute.

Upon this demurrer the court below gave judgment for the defendant, and plaintiffs sued out their writ of error from this court, and assign for error the court's judgment in favor of said demurrer.

The court below sustained the demurrer principally upon authority of the case of Halsey vs, McLean, decided by the Supreme Court of Massachusetts, and reported in 12 Allen.

The learned Judge of the Circuit Court, admitting from the bench that his impressions were the other way, but with

a modesty, which I respectfully suggest, was inordinate, declined, sitting as a Circuit Court, to array his judgment against the opinion of the Supreme Court of Massachusetts, probably deeming it more appropriate that this court should declare the State's position and policy in respect to the question as to how far the law of New York shall through comity be recognized as operative by the courts of Florida.

The question is now before this court whether the defendant's liability (which, it was not in the court below, and it is presumed will not be controverted, is a liability which would be enforced in the State of New York,) can be, or should be, enforced by the courts of Florida.

Argument.—Defendant claims that this case does not come within that comity which sanctions the enforcement of a foreign law, and relying mainly upon the opinion volunteered by the Supreme Court of Massachusetts, claims that the liability of defendant is a liability created by statute of another State, and a penalty which the courts of Florida cannot enforce.

It is true that the laws of New York have not, *ex proprio vigore,* any extra territorial force, and probably it would be competent for the State of Florida to declare the law involved in this case and all other foreign laws as inoperative and not to be enforced by her courts, but until she does so, the courts are as much bound to recognize the law of comity as any other law of the land.

"Courts of justice in one State will, out of comity, enforce the laws of another State when by such enforcement they will not violate their laws or inflict an injury on some one of their own citizens; as for example, the discharge of a debtor under the insolvent laws of one State will be respected in another State where there is reciprocity in this respect." 1 Bouvier's Law Dic., 244.

The Supreme Court of the United States, in Bank of Augusta vs. Earle, says: "It is truly said in Story's Conflict

of Laws, 37, that 'in the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.'" 13 Peters, 589.

"The extent of comity, that is, the degree of force and obligation the laws of one county have in another, depends solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." Story's Conflict of Laws, §23.

The extent is broad or narrow according to the policy of the particular State. Ibid., §38.

In the absence of legislation upon the subject, practically it is a comity of courts; for the exercise of comity in admitting or restraining the operation of a foreign law rests unavoidably in a sound judicial discretion, dictated by the circumstances in the case. 2 Kent's Com., 458, note.

The case of Halsey vs. McLean, if considered an exposition of the will of that State, shows that Massachusetts has taken a contracted, narrow view of this subject, as of some others.

There is no reason why other States, and especially this State, should be restricted to such narrow doctrine. It will be more in accord with its broad and liberal policy to follow the advice of Chief-Justice Taney and adopt that "greater degree of comity and friendship" so strongly urged upon the States by the Supreme Court of the United States in Bank of Augustā vs. Earle. 13 Peters, 519, 539, 589.

Upon this subject see also: Hallman vs. Johnson, Cowper, 341; 2 Kent's Com., Sec. 39, marginal page 453 to 463; Holmes vs. Remsen, 4 John. Ch. R., 469; 13 Peters, cited supra, 519, 588-91.

Our State extends to a New York corporation the comity

of suit, and "the right to sue is one of the powers which it derives from its charter."

"If the courts of another county take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty—when the last-mentioned power does not come in conflict with the interest or the policy of the State?" 13 Peters, 591.

By comity, then, the foreign law is recognized and enforced so far as it gives right to a foreign corporation to come here and contract and enfore its contracts in our courts; but when the same law is invoked to protect the rights of parties who contract with it, we are told it is not a law within the comity of States. It and its members are bound by its contracts at home; in Florida, although parties contracting with it are as fully bound as though they contracted with it in New York, yet it and its members are not bound. If such is comity, deliver the people of Florida from it. It is too one-sided.

It would seem that if by comity the law of New is recognized and enforced in favor of New York citizens and a New York corporation, it would be the interest and the policy of Florida to enforce the same law to protect her own citizens.

It will be observed that in the celebrated case of the Bank of Augusta vs. Earle, there was not involved any foreign contract.

In the case at bar there is a contract which was made and was to be performed in the State of New York. The law of New York then is to govern "as to the nature, the obligation, and the interpretation of the contract." Story's Conflict of Laws, §263; Mr. Cowen's note, 4th Cowen's R., 635.

The Supreme Court of the United States says: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country." 13 Peters, 589.

The question as to defendant's individual liability belongs to the nature and obligation of the contract. Story's Con. of Laws, §§263, 266, 267, 278, 286, note 2.

In case at bar contract was a valid contract by stockholder, defendant to pay if his agents, the officers, did not and could not pay. 1 Coms., 47, 59.

The statute sections 10, 11, provided a way in which defendant and associates might avoid the liability, and transfer it absolutely and finally upon the company, but, as to these sections, does not create any new liability, merely keeping alive, until certain acts are done, a common law liability, for the common law favors the personal liability of the members for all the debts of the company. 20 Wend., 616.

The statute, and acts and omissions of the defendant and associates, under it, are a part of every contract entered into, and every one is presumed to have contracted with the knowledge of the liability of the individual stockholders. 1 Coms., 55-6-7-8-9; Ang. & Ames on Corp., §611, note 5; 2 Hill, (N. Y.), 269. Every contract then amounted to a promise on the part of each stockholder to guarantee payment of the liability to the extent of a certain sum. But the defendant's demurrer altogether rests upon the assumption that his liability is a mere creature of statute, is a penalty.

To support this, he relies principally upon the construc-

tion given to the statute of New York by the court of Massachusetts in Halsey vs. McLean, where it will be seen the court volunteered to construe section 10. We contend that the most competent authority to construe that statute are the courts of New York. It is by the courts of New York well settled that defendant's liability is not in the nature of a penalty, but may be enforced as a contract. Allen vs. Sewall, 2 Wend., 338; Moss vs. Oakley, 2 Hill, 265; Bailey vs. Bancker, 3 Hill, 188; Harger vs. McCullough, 2 Denio, 119; *ex-parte* Van Riper, 20 Wend., 614; (this case shows that the more liberal State of New York has not adopted the narrow, contracted view of Massachusetts as comity between the States); Corning vs. McCullough, 1 Coms., 47; above cases cited in Bk. of Plymouth vs. Price, 33 Md., 493; Ang. & Ames on Corp., §611.

The construction of the statute by the New York courts would be binding upon the Supreme Court of the United States. Green vs. Lessee of Neal, 6 Peters, 291-7-8-9. Why then should it not bind the courts in Florida?

But the New York construction is the natural and logical construction as to the liability under sections 10, 11, here sought to be enforced.

Defendant with associates, at the time of contracting with plaintiffs, contracted through their agents, the officers of an inchoate corporation, and were liable upon their contract as if no attempt had been made to become incorporated. Angel & Ames on Corp., §611; Allen vs. Sewald, 2 Wend., 327.

They continued as individuals liable for all the contracts they, through their said agents, might make, until their inchoate and qualified, should become a complete, unqualified corporation, one of the principal common law attributes of which is the total exemption of the individual corporators from liability.

Parties contracting with defendant and associates are presumed to have known the anomalous character in which de-

fendant and associates were contracting, and to have contracted with them in that character.

The statute is part of the contract—a part which, at different times, might be of different force and effect; but, as to the case at bar, it appears that when contract was made between plaintiffs, and defendant and associates, the latter were individually liable for the promises made by them through their agents. As to liability under other sections, for instance section 12, that is a liability arising after the exemption of individual liability had once been complete; and it may well be, as it is, considered a liability created by statute, and in the nature of a penalty for a default, for the liability did not exist until the default; but as to the liability sought to be enforced here, the defendant was "answerable as an original and principal debtor," in the language of Judge Bronson, in Corning vs. McCullough, cited, and continued to be so answerable until he, through his agents, should relieve himself from such liability by substituting a full-grown artificial person to assume the liability.

The failure to do certain acts did not make but left the stockholders subject to a natural and original liability for their contracts—a liability from which they might have exempted themselves by the doing of those acts, that is, by creating, with notice to the world, a fund out of which creditors could satisfy their claims.

The distinction between the liability of a stockholder under sections 10 and 11, and the liability of an officer for failing to perform a duty, for instance the liability under section 12, is clearly stated by the Superior Court of New York in Bird vs. Hayden: "A personal liability for debts or a corporation, imposed by its charter upon its officers for failing to perform a duty with which they are charged, is *quasi penal,* and therefore the courts of this State have no jurisdiction to enforce such liability when the charter creating it was granted by another State; but the personal liability

of the stockholders by statute arises out of their original liability if they had not been exempted therefrom by such statute. An action against them is, therefore, upon their contract in a qualified corporate capacity." 1 Robertson, 383.

Many cases are found in the New York reports in which the courts hold that the liability of an officer for failure to perform a duty is in the nature of a penalty, but no case in which it is intimated that the liability of stockholders, under sections 10 and 11, is of that character. That such liability was limited by the interest each stockholder held in the business does not change the character of the liability—snch limitation was a part of the contract. Story's Con. of Laws, §§263, 316, b., 320, a., 322.

The statute, and the New York courts construction of it, and the fact that the defendant was acting in an inchoate "qualified corporate capacity," with no immunity or exemption from personal liability, entered into all contracts, and fixed and limited the extent of liability in the same way and to the same extent that the mandate enters into the contracts of agents and fixes and limits the liability of the principals. Has that part of contract comprised in the statute any less force than if attached literally and bodily to every contract made by defendant?

The plaintiffs contracted with defendant and associates on the faith of the surety set forth in the statute as part of contract, and they trusted as well to the personal liability of defendant as to responsibility of corporation for fulfillment of the engagement. 1 Coms., 55.

The provision that the plaintiffs must first obtain judgment against the corporation, does not effect their rights to the personal liability of the defendant stockholder. Nor does it prevent the liability of the defendant to plaintiffs from attaching and becoming perfect on consummation of the contract of the creditors, the plaintiffs, with the corporation. It simply defers the remedy. Corning vs. McCullough, 1

Coms., 47; Harger vs McCullough, 2 Denio, 119-124; Moss vs. Oakley, 2 Hill, 265-270; Angel & Ames on Corp., §611, note 5. And the construction of the statute, by the courts of New York, entered into and became a part of the contract, and defendant became bound by that construction. Or consider the defendant in the light of a guarantor—he promises to pay debts contracted by the company to extent of $75,000. Is not that a contract that the courts of any State ought to enforce? Nor is it any answer to say the defendant's liability was limited and conditional under the laws of New York. Story's Conflict of Laws, §§263, 322, 322, b. If the contract created a personal liability in New York, that liability follows the contract and person everywhere. Ib., 322. Consider the case of an endorser. Ib., §316, b. A limited or special partnership. Ib., §320, a. And whether partner is liable in *solido* for proportionate share. Ib., §322.

There can be no doubt that defendant's liability is in the nature of a contract; that it is governed by the law of New York, as interpreted by its courts; that to refuse to enforce that liability would be to totally ignore the plainest and best established rules of construction and law of comity as to commercial transactions.

The plaintiffs confidently insist there can be no doubt that the courts of Florida are, even by the narrowest doctrine of comity, bound to enforce that liability, as it would be enforced in the place where the contract was made, and was to be performed. But should there be any doubt in the mind of the court, it is safer, in view of the commercial relation between the States of this Union, to enlarge, rather than restrict, the beneficent law comity.

It resting with each State, and practically with the courts of each State, to adopt either a narrow or a broad and liberal policy and doctrine of comity, it is confidently believed that the courts of this State will adopt the latter;

and that this court will not, in the exercise of its discretion, hesitate to take a step in that direction, and will not be deterred by the steps in an opposite direction taken by the courts of Massachusetts,and perhaps one or two other States.

Whether this court will recognize the "enlarged comity" urged upon the States by the Supreme Court of the United States, depends upon its discretion—a "rule of decision, and not a question of jurisdiction." Holmes vs. Remsen, 4 John. Ch. R., 471. And inasmuch as the court's "discretion is to be dictated by the circumstances in the case," no more forcible dictation could be imagined than the circumstances in this case. The defendant, by comity, is authorized to act here in the character which is given to him by New York laws, and in that character obtains plaintiffs' goods, upon the pretense and showing of an individual liability. Is he to be permitted to come into a court of Florida and say, because my contract consisted in part of a statute of a foreign State, it is not binding in Florida, and Florida courts will not enforce it? Defendant comes into the State, holding out that he is liable for his contracts, as he would be in New York, and after having obtained all the credit he could from the citizens of Florida, has, through the form of the bankrupt law, transferred all the property, which he held in the character of an inchoate corporation, to himself as a natural person; and when his creditors seek to enforce the liability, upon the credit of which the property was created, they are told it is not the "policy" or the "interest" of Florida that its courts should enforce contracts and justice in behalf of its citizens—which, if we reserve the position and circumstances, we see from 20 Wendell, 614, and 1 Rob., 383, the courts of New York would enforce in behalf of its citizens against citizens of Florida.

R. L. Campbell for Defendant in Error.

This action is founded on the 10th section of the New York incorporation act of 17th February, 1848; and was brought by the plaintiff in error to recover three debts, one contracted in Louisiana, and the others in New York, by the Pensacola Lumber Company, a corporation organized in the State of New York, under that act, of which corporation the defendant was a stockholder.

The declaration, after stating the above facts, and that a judgment had been obtained against the corporation, on which execution had been issued, and returned *nulla bona*, recites: "That under the provisions of said act of the Legislature of the State of New York, all the stockholders of said company are severally individually liable to the creditors of the company, to the amount of stock held by them respectively, for all debts and contracts made by said company, until the whole amount of capital stock fixed and limited by said company shall have been paid in, and a certificate thereof shall have been made, signed, and sworn to by the president and majority of the trustees, and recorded in the office of the clerk of the county wherein the business of said company is carried on.

A failure to make and record the required certificate is also alleged; and, "wherefore, the defendant became liable to pay the said debt and contract by said company."

The Circuit Court did not err in sustaining the demurrer to the declaration.

Official neglect of a duty, imposed by the laws of another State, is the gist of the case against the defendant.

No such case can, under the rule of comity, be maintained in the courts of this State.

The 10th section (page 24) of the New York statute, on which this case is founded, does not impose any liability upon the persons composing the stockholders, as in the case

of the Rossie Galena Company, Corning vs. McCullough, 1 Comst., 47.

But treating the corporation as created under section 2, (page 17) the 10th section attaches to its components, *qua* stockholders, certain individual liabilities.

1. Stockholders are severally individually liable to the amount of each one's stock, until the entire amount of the capital stock of the corporation is paid in.

2. Stockholders are so liable, although the entire capital stock be paid in, upon the failure of the officers to file the required certificate.

This case is not founded on the first predicate of the 10th section, and therefore no supposed equity, growing out of the defendant's failure to pay his quota of the capital stock of the corporation, can be urged against him.

His liability, if any, falls under the second predicate, and as a consequence of official default of others.

Again, this being a case involving both a foreign creditor and a foreign corporation, no argument in favor of jurisdiction can be founded on the policy of enabling home creditors to enforce such liabilities against resident or sojourning stockholders as was, ineffectually, urged in Bird vs. Hayden, 1 Rob., 383.

The expositions which the statute has received from the courts of New York and other States show that the liability sought to be enforced does not rest upon any contract, express or implied, involving a common law obligation, binding the stockholder either individually or jointly with others.

He is not liable as a copartner. Woodruff & Beach Iron Works vs. Chittenden, 4 Bosw., 417; and yet such would be the shape of the liability if it came from the common law.

The common law knows nothing of a liability attaching to two or more associates in business, individually and sev-

erally, not jointly, not co-extensively with the debts, but meted out to each associate by the accidental measure furnished by the amount of his stock, and that too, finally dependent upon the failure of the trustees to make and file a certificate.

Again, there exists no original, absolute, individual liability on the part of any stockholder to any creditor; for payment by a stockholder of a debt, equal in amount to his stock, to one creditor, is a bar to an action against him by any other creditor of the corporation. Ibid. Eaton vs. Aspinwall, 19 New York, 119.

One creditor "may sue alone, although there may be other creditors similarly situated." Weeks vs. Love, 50 New York, 368.

"The defendant's liability does not arise from any act connected with the creation of the debt." Merchants Bank of New Haven vs. Bliss, 1 Rob., 391.

"It is difficult to imagine a liability more wanting in all the features of a contract, or more fully possessing those of a penalty." Ibid.

That was an action, like Derrickson vs. Smith, (3 Dutch., 166,) against trustees, under 12th section of the statute, (page 26) to make them liable for the debts of the corporation in consequence of their failure to publish the annual report.

That the liability in this case is sought to be fixed upon a stockholder for a different act of official negligence, does not change the nature of the liability.

In this case, as in those, official default is the ground of the liability. What was said of the declaration in Derrickson vs. Smith, is equally applicable to the declaration in this case: "The declaration, although nominally upon promises, negatives all promises, and claims a liability upon a mere default."

If to make the officers liable for the debts of the company,

in consequence of their having left undone something required by law, is in the nature of a penaly, it is a harsher penalty to visit such liability on a stockholder, whose only fault may have been misplaced reliance on such officer.

In Bird vs. Hayden, 1 Rob., 383, the court says: "But where there is no qualification to the corporate capacity of the company, and where the stockholders are not answerable to the creditors of the company as original and principal debtors, but they or the officers become liable, by reason of some act, the performance of which is imposed on them by the statute, then the action must be upon the statute to recover a debt in the nature of a forfeiture for a failure to perform a duty."

In Halsey vs. McLean, 12 Allen, 438, which, like this case, involved a liability under the 10th section, such liability was regarded by the Supreme Judicial Court of Massachusetts as being in the nature of a penalty.

Corning vs. McCullough, 1 Comst., 47, illustrates what is an original liability founded on the debt.

Bird vs. Hayden, Woodruff and Beach Iron Works vs. Chittenden, Merchants' Bank of New Haven vs. Bliss, *supra;* Jones vs. Barlow, 62 N. Y., 202; Lawler vs. Burt, 7 Ohio St., 341; Kritzer vs. Woodson, 19 Mo., 327; Hill vs. Frazier, 22 Penn., 320, shows that where a liability is the immediate consequence of the failure of officers of a corporation to perform a duty imposed on them by statute, such liability is a *quasi* penalty.

Courts of other States will not enforce such a liability. Bird vs. Hayden, *supra;* Halsey vs. McLean, 12 Allen, 438; Derrickson vs. Smith, 3 Dutch.; 27 N. J., 166; Bank vs. Price, 33 Md., 487.

But aside from the penal character of the liability, it is not only of purely statutory origin, but for its enforcement regulations are prescribed unknown to the common law, the statute law, and the rules of procedure of this State.

Under our practice the note of one party cannot be enforced by an action against another who is not a party to such note; nor is judgment against one a condition precedent to obtaining a judgment against another who is not a party to the first.

Tested, therefore, by our rules of procedure, the declaration presents no cause of action against the defendant.

The remedy so regulated by the 24th section (page 34) of the N. Y. statute is inseparable from the liability, and that remedy falls without the pale of comity. Pickering vs. Fish, 6 Vt., 102.

It was this consideration that led the Supreme Court of Massachusetts, in Halsey vs. McLean, to say of that statute: "It must be regarded as a part of the statute system of another State incapable of execution, *alieno foro.*" See Erickson vs. Nesmith, 46 N. H., 371, page 378.

E. A. Perry in reply.

Defendant's first attack is upon the wording of the conclusion of the declaration, "wherefore he became and is liable," &c. The conclusion is not now a material part of any pleading. The facts alleged in it determine its character and sufficiency.

The word "wherefore" in the declaration does not, however, as considered by defendant, relate only to the allegation that said defendant and associates had not taken the steps necessary to exempt them from individual liability, but it relates to all the facts set forth in the declaration—the making of the contracts, the failure of the company to pay, and of the judgment to be satisfied.

As in case of declaration upon policy of insurance. There would be set forth a contract by the insurer to pay upon the happening of certain contingencies, as for instance, the burning of the property insured, the making of the proofs by the

insured, the lapse of the sixty days thereafter as the contract might provide, and the declaration would properly close with the words, "wherefore the insurer became and is liable to pay," &c. The insurer was *bound* by his contract from the time it was made, but did not become *liable* to pay until the happening of the contingencies.

The plaintiffs fail to find in either of the authorities cited by defendant, viz: 6 Vt., 102, or 3 Dutch., 391, anything to sustain defendant's objection to the declaration in this respect—an objection raised here for the first time since the passage of the Pleading and Practice Act, as far as I have been able to learn.

"But there is a class of actions and causes of action which involve statutory provisions in a greater or less degree, but which, though the statute is a necessary link in the chain of title to the remedy, and they may, to some intents, be said to be under the statute, are not, in the legal acceptation of the terms, actions upon the statute." 1 Coms., 65.

Defendant next claims that by section 2, (page 12, of the act,) the defendant and associates became clothed with the full character and attributes of a corporation, and that section 10 imposed upon them liability for the failure of the officers to do a certain thing. This claim is fully answered by the New York Court of Appeals, (1 Coms., 57-8,) and by considering that to relieve themselves from a liability from which they had never been exempt, was a privilege allowed but not a duty required, the non-performance of which *created* or *imposed* upon them a liability which did not pre-exist. And here it may be remarked that defendant assumes too much in assuming that the capital stock fixed and limited by the company had been paid in. There is nothing in the record to authorize such assumption.

When the law requires that the doing of any act shall be evidenced in a particular way, the denial of such evidence would certainly not raise any presumption that the act had

been done. The presumption here is that the stock was never paid in, for had it been it is presumed the company, through its officers, would have taken the necessary steps to make it known to the world.

Defendant argues that there is a distinction between the liability in case of Rossie Galena Co. before the court in 1 Coms., and that here under section 10, and cites Woodruff & Beach Iron Works vs. Chittenden, 4 Bosw, 417, to break the force of the former decision. The only difference is that the *burden left upon* the stockholders is lighter in the one case than the other. In the former case the court simply held that the stockholders were *inter se like* partners. The court could not and did not hold that their liability was the common law liability of partners—it was joint and several, very different from partnership liability under the law. Page 60. And the court in 4 Bosw. very properly noted that the liability under section 10 was not joint, and consequently there was nothing that prevented one stockholder from suing another. In this particular only did the court hold there was difference. It did not hold that the character and nature of the liability, in respect as to whether in the nature of contract or penalty, was different in one case from the other. There is not a word in the court's opinion that intimates that the liability is in the nature of a penalty; nothing to show that the reasoning of the court in 1 Coms., as to the *nature* of the liability, does not in every respect apply to the liability under section 10, here sought to be enforced.

In reply to defendant's claim that the liability is not a common law liability, read 1 Coms., 60-1. Many liabilities arising from foreign contracts which are not common law liabilities are enforced—instance that given on page 60, 1 Coms. Likewise the liability of a partner upon a firm contract, made where the law makes partners liable only for a proportionate share; or where the law authorizes a limited

partnership; the case of endorsers, acceptors, and sureties, whose liabilities depend upon the *lex loci* contractors, and are enforced, whether common law liabilities or not.

Making the burden more or less onerous than under the common law does not effect the principle. Harger vs. McCullough, 2 Denio, 124; 1 Coms., 60. The question is whether the liability grows out of a contract, express or implied, or is a mere statute liability in the nature of a penalty? How can it be said that a thing which always existed was imposed as a penalty?

In the case of Pickering vs. Fisk, cited by defendant, the suit was upon a "penal bond," (page 102,) and there was, and could be, no pretense that there was any contract into which entered the statute of New Hampshire, (page 109.) The person for whose benefit the suit was brought was a perfect stranger to the bond; not so here, where the suit has "for its object the recovery of a debt for goods sold to a company, of which the defendant was a member and personally liable for the payment of its debts, and which action, in no just sense of the term, partakes of the character of either forfeiture or penalty." 1 Coms., 61.

Consider the case of Bird vs. Hayden, and the language from which defendant derived so much comfort, viz: "But where there is no qualification to the corporate capacity of the company, and where the stockholders are not answerable to the creditors as original and principal debtors; but they or the officers become liable, by reason of some act, the performance of which is imposed on them by the statute; then the action must be upon the statute to recover a debt in the nature of a forfeiture for a failure to perform a duty."

There was a qualification to the corporate capacity of the company, of which defendant was a member, which left the stockholders answerable to the creditors as original and principal debtors, (for, by the head notes of the case which was reported by Chief Justice Robertson, "The personal liability

of stockholders by statute arises out of their original liability, if they had not been exempted therefrom by such statute," and stockholders in case at bar had not ever been so exempted,) and inasmuch as they had never been exempted, they did not become liable by reason of any act, the performance of which was imposed upon them by the statute; consequently the action is not to recover the debt in the nature of a forfeiture for a failure to perform a duty, and "an action against them is, therefore, upon their contract in a qualified corporate capacity."

The case of Merchants' Bank of New Haven vs. Bliss establishes what plaintiffs long have admitted, that the liability for debts of a corporation imposed by its charter upon its officers, for failing to perform a duty with which they are charged, is *quasi penal.* Likewise Jones vs. Barlow, 62 N. Y., 202, which is a case under penal Section 12.

We come now to Lawler vs. Burt, 7 Ohio St., 341, upon which defendant so much relies, and which plaintiffs consider another good authority to establish the difference between the liability of stockholders who have never been exempt by statute, and the liability which is imposed as a punishment for doing a wrongful act, as in this case for breach of the statute, "to prohibit the issuing and circulating unauthorized bank paper." This case very properly holds that doing this unlawful act is a tort, and the liability imposed as a punishment therefor is a penalty.

The same may be said of the case of Kritzer vs. Woodson, 19 Mo., 327, which holds, as would the New York and all other courts, that the liability imposed upon officers for permitting indebtedness in excess of capital stock, was a punishment for doing a prohibited act.

So also the case of Hill vs. Frazier, 22 Penn., 320, where the officers' liability was imposed upon them as punishment for making dividends out of capital stock.

Bank of Plymouth vs. Price, 33 Md., also holds: "That

the liability imposed upon the directors and officers of such corporations is in the nature of a penalty." Here also the liability was imposed as punishment for doing a prohibited act, *i. e.*, permitting debts and liabilities to exceed the amount of the capital stock.

The case of Derrickson vs. Smith, 3 Dutch., 166, is another good authority for the distinction between the liability here sought to be enforced, and the liability under the penal section of the act (see pages 169, 174, 176); and this case, (page 169,) and the case of Bank of Plymouth vs. Price, 33 Md., on page 453, admit the law to be settled by the New York courts as claimed by plaintiffs.

So of all the authorities cited from other States, there is not one that holds that the liability, such as is here sought to be enforced, is in the nature of a penalty rather than in the nature of a contract, except the case of Halsey vs. McLean; and as to this, plaintiffs, with due deference, submit, that if the court had confined itself to the question involved it would have ruled in conformity to the decisions of the New York courts.

The auditor or referee found the defendant liable as trustee under Section 12, and the court below confirmed such finding. The Supreme Court had nothing to do but reverse the judgment, because the liability under that section is held by the courts of New York to be, what it undeniably is, in the nature of a penalty; and also because the contingencies had not happened which made it obligatory upon defendant to pay. All of the decisions beyond that may be considered as the mere opinion of the judges of that court upon a law of the State of New York.

The defendant then has failed to find any authority even outside of New York, and certainly find none from the courts of New York, to justify the denial of the proposition that the personal liability of the stockholder defendant, by section 10, arises out of his original liability, inasmuch as he

had never been exempted therefrom; original, because it has not been imposed, but existed from the first.

Defendant's authorities do show what plaintiffs admit, that where a liability from which they had been at one time exempt is again imposed upon either officers or stockholders for wrongful acts of omission or commission, such a liability is a *quasi* penalty. But no such liability is sought to be enforced in this case.

But the defendant contends that for the enforcement of the liability regulations are prescribed unknown to the common law, the State law, and the rules of procedure of this State. No more than in any other case of contract where the duty to perform, to execute a liability on one side, and the right to demand the performance and enforce the liability under the contract on the other side, is deferred till the happening of certain contingencies. This is all a part of the contract. As in case of a guaranty that a certain debt will be paid where it enters into the contract that the creditor shall first exhaust his remedy against the principal, and in a multitude of cases that will readily present themselves to the mind of the court.

Indeed, under our practice the note of a party might be enforced by an action against another whose name did not appear as a party to such note. Suppose a case where, under the laws of the place where the note was made, certain relationship made the maker of the note agent for the party against whom action was brought.

And there might be many cases where, under a contract, it would be necessary to obtain judgment and return of execution unsatisfied, as condition precedent to demanding and enforcing the performance of an obligation against another whose name does not appear as a party to the first.

The authorities cited in plaintiffs' brief show that these are all matters of contract; so is the limitation provided in sec-

tion 24, which seemed such a stumbling block to Halsey vs. McLean.

In the case of Riddlesbarger vs. Hartford Insurance Co., where there was, as here, a limitation prescribed by the contract, it was argued as it is argued here that the limitations contravene the policy and statutes of the State and cannot be enforced. But the Supreme Court of the United States take a different view, and enforce it as a part of the contract. 7 Wal., 386.

There is no requirement that the judgment should be obtained in the court in which the stockholder is sued. So the obtaining a judgment, and failing to satisfy it from the company, is no part of the remedy, but is one of the contingencies which must happen before the stockholder can be called upon to perform his contract. It is no part of the "procedure" against the stockholder, and no different procedure is necessary against him than that provided by the rules and practice of the courts of Florida.

The effort to collect the debt from the company required here, is no more a part of the remedy than the requirement in the charter before the court in ex-parte Van Riper, that demand should be made at the bank during the usual hours of business.

So at last, as was the question in the court below, the question is: Is the liability here sought to be enforced a liability imposed as a penalty, or is it a liability in the nature of a contract?

When described as an original liability by the New York courts, the term "original" is used in contradistinction to the term imposed, and if it existed from the first, it is, as held by the New York courts, "original," and not imposed as a penalty or forfeiture.

THE CHIEF-JUSTICE delivered the opinion of the court.

Plaintiffs in error sued defendant, and alleged that defendant was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York under the provisions of an act of the Legislature of that State entitled "an act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," and the amendments thereto; that the defendant is a stockholder in said company, holding stock to the amount of $75,000, being one-fourth of the entire amount of stock of said company; that said company did business and had an agent and office in Escambia county, Florida; that the company in 1874 was indebted to the plaintiffs in certain notes and in account stated; that in March, 1875, they recovered a judgment upon such indebtedness in said Escambia county for upwards of fourteen thousand dollars, upon which judgment execution was issued and duly returned unsatisfied for want of property on which to levy; that by the provisions of said act of the Legislature all the stockholders of said company are severally individually liable to the creditors of said company to the amount of stock severally held by them for its debts until the whole amount of the capital stock shall have been paid, and a certificate thereof shall have been made, signed, and sworn to by the president and a majority of the trustees of said company, and recorded in the office of the county clerk of the county wherein the business of said company is carried on, and the declaration avers that the president and a majority of the trustees of said company did not make, sign, swear to, and record such certificate as required by said act, to exempt the defendant from liability, wherefore the said defendant became liable to the said plaintiffs for said debt and the contracts made by said company, &c.

To the declaration the defendant demurred—first, that it

does not set forth any cause of action; second, that it does not set forth a cause of action cognizable by this court. The court sustained the demurrer.

The sections of the act of the Legislature of New York, referred to in the pleadings and upon the argument of the cause, are as follows:

"SEC. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section:

"SEC. 11. The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall, within the said thirty days, record the same in the office of the county clerk of the county wherein the business of the said company is carried on."

"SEC. 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against said company within one year after the debt shall become due; and no suit shall be brought against any stockholder * * until an execution against the company shall have been returned unsatisfied in whole or in part."

The demurrant insists that "official neglect of a duty imposed by the laws of another State is the gist of the case

against the defendant," as the case is stated in the declaration, and says the 10th section attaches to the components of the corporation certain individual liabilities—"First, *stockholders* are severally, individually liable to the amount of each one's stock, until the entire amount of the capital stock of the corporation is paid in;" and "second, stockholders are so liable, although the entire capital stock be paid in, *upon the failure of the officers* to file the required certificate."

The position is that the liability is one created by the statute of another State, and is one *imposed by* such statute in consequence of the failure of certain officers to perform a required duty, and is therefore a *penalty* prescribed by such foreign statute, and that the courts of this State cannot enforce such penal statutes. If this deduction is correct, that this liability is a penalty, and not arising strictly out of contract, we are not prepared to deny the demurrant's conclusion.

The case of Bird vs. Hayden, (1 Robertson, N. Y., 383,) cited by defendant's counsel, was a suit in New York against a director of a manufacturing corporation created under the laws of Massachusetts. A provision of the act required that the officers should annually make and file a certain certificate of the condition of the company, and *in case of neglect* the officers were declared by the act to be jointly and severally liable for the payment of the debts of the corporation created after such neglect and before the filing of the certificate. The court held that actions to recover penalties created by the statutes of other States, being local, are not cognizable by the courts of New York. (14 John., 338; 17 John., 4; Story Comfl. Laws, §§620-621.) The court says there is nothing in the act of incorporation of this company which rendered the directors or stockholders liable in the first instance for the debts of the company, as there is in the general banking law and other laws of that State.

There is no personal liability if the company fails to pay, and hence there is no right of action against the stockholders for any debt contracted by the company so long as the officers discharge the duties imposed upon them by law. It is only upon their neglect or refusal to perform their duty that they render themselves liable. The court adds: "The personal liability of stockholders, where they are made liable by the charter or act of the Legislature, is from the *inception of the debt*. They became originally liable, and the happening of no event is necessary to charge them. The company is invested with a qualified corporate capacity, but no immunity or exemption from personal liability for the debts of the company. In these cases, in judgment of law, the debt is contracted upon the terms and security authorized by the statute, and the creditor having exhausted his efforts to collect from the company, may resort to a common law action directly to the stockholders, not to recover a penalty or forfeiture, nor upon a cause of action in the nature of a forfeiture, but to recover a simple contract debt for which he was liable at the time it was contracted. The action is *that* case is not *upon* the statute, and a mere reference to it is all that is necessary to show the connection of the stockholders therewith, and the liability it creates." But in the case before it the court holds that the personal liability for the neglect or refusal to perform a duty was in the nature of a penalty or punishment, and hence no action could be maintained therefor in the courts of New York.

Counsel for defendant says "he is not liable as a copartner, yet such would be the shape of the liability if it came from the common law," and cites Woodruff & Beach Iron Works vs. Chittenden, 4 Bosworth, 417. There, it is true, the court say the stockholders are not partners; but the court was merely remarking upon the position assumed, that the plaintiff and defendants in the case were *all* stockholders, with a limited liability, whereas as to partners

there was no limit, and, in that case, a judgment against a stockholder in a manufacturing corporation was recovered by a creditor of the company for the use of other stockholders, limited by the amount of his stock. The suit was not brought to recover a penalty, and the court held that the liability was not in the nature of a penalty. In Eaton vs. Aspinwall, (19 N. Y., 119,) the court says the "credit was given upon the faith, not only of the liability of the corporation as such, but ultimately of the several stockholders of its capital. Weeks vs. Love, (50 N. Y.,) merely decides that creditors may sue severally, and holds that when a stockholder has paid debts of the corporation equal to the amount of his stock, he is relieved from further liability. It is also remarked by the court that "the liability is created for the security of creditors."

The Merchants' Bank vs. Bliss (1 Rob., 391,) was an action brought to charge the trustees, not because of any original liability for the debts of the corporation, but for a neglect of duty whereby they were subject to a forfeiture, and this was properly held to be a penal action as for an offence.

In Derickson vs. Smith (3 Dutcher, N. J., 166,) it was held that an action for a liability under section 12 of the New York manufacturing incorporation act, being a liability *imposed* by statute for the *neglect* of the defendant as a trustee to make certain reports, was a proceeding to enforce a penalty prescribed by the Legislature of another State, and the court refused to maintain the suit. The court, however, draws the distinction very plainly between such a suit and one against the individual corporators who are held to be jointly and severally liable for the debts of the corporation. In *such* case (said Elmer, J.,) the stockholders must be considered original parties to the debt, so that their liability attached on the consummation of the contract with the corporation, and so that a provision in the acts requiring credi-

tors first to obtain a judgment against the corporation simply operated to defer the remedy against them until the remedy against the corporation should be exhausted. And Green, C. J., says: In such case it is held that the stockholders are liable in an original and primary sense, like partners, and that their liability is not created by the statute of incorporation. He *assumes* the liability by becoming a member of the corporation. The personal liability of the stockholder to pay the debt is the immediate and necessary consequence of the contract made by the company. It becomes by the terms of the charter his debt, otherwise of the liability which attaches as a consequence of a violation or neglect of a duty prescribed by the statute.

In Corning vs. McCullough, (1 Comst., 47,) the court, speaking of the character of these corporations, says: It is not a general, unqualified incorporation of the company imparting to the stockholders and members composing it as a legal consequence an exemption from personal liability for the debts and engagements of the body corporate. It is a legislative grant of a special qualified corporate capacity, with adequate plenary powers for the purposes of its institution, but with the personal liability of the stockholders for the debts the company shall contract and the liabilities they shall incur. And Justice Bronson, concurring, said it has been several times held that the stockholders of this and other like companies stood substantially upon the same footing as to liability as though they had been partners or an unincorporated association; that they were answerable to the creditors of the company as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation. 2 Wend., 338; 20 ib., 614; 2 Hill, 265; 3 ib., 188; 2 Denio, 119. The court in Corning vs. McCullough holds that such liability of a stockholder is not in the nature of a penalty.

The question in Lawler vs. Burt (7 Ohio St.R., 340,) was

whether a statute making a stockholder liable for the circulating notes unlawfully issued by a company or corporation, other than a bank, was a penal statute, and the court held that it was.

It was held it Kirtzer vs. Woodson (19 Mo., 327,) that the liability under the Missouri statutes, prohibiting an excess of indebtedness over and above the capital stock of an incorporated company, was penal, and not arising out of contract, and a stockholder could not recover from a director.

The suit of Jones vs. Barlow (62 N. Y., 202,) was against trustees for a failure to make an annual report, and not upon any original liability of the trustees. The liability was imposed as a penalty and not assumed as a contract.

The liability in Hill vs. Frazier (22 Penn. St. R., 320,) was for unlawfully declaring a dividend as one of the directors; a penalty for wrong-doing.

In the First National Bank of Plymouth vs. Price *et al.*, (33 Md., 487,) it was held that the liability imposed upon the directors and officers of a Pennsylvania corporation for unlawfully contracting debts beyond the amount of the capital stock, is in the nature of a penalty, and could only be enforced in Pennsylvania. The court holds that the liability does not arise out of contract, and says, that while a contract made in one State is enforced in other States agreeably to the law of the State where it is made, it is well settled that no State will enforce penalties imposed by the laws of other States. The court remarks: "It has been decided by the courts of New York in several cases, and seems now to be there well settled, that where by a statute it is provided that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not inthe nature of a penalty, but may be enforced as a contract."

The court in Vermont, Pickering vs. Fish, (6 Vt., 102,) held that the courts of that State would not take cognizance

of an official bond executed in another State, for the purpose of enforcing it in a peculiar manner unknown to the common law, directed by a statute of that State, for the court says "it is not a contract originating in the ordinary business transactions of men, created for private and individual purposes as evidence of private right. If it were such, it would be transitory as to the persons of the contracting parties, and would be enforced in any jurisdiction where the legal obligation of contracts is recognized. It is a general rule that courts of all civilized nations will enforce contracts executed in foreign States where the parties are within their jurisdiction; and for this purpose will have regard to the laws of the place where the contract may be made."

Thus far we have examined all the authorities cited by the defendant in error, in the order in which they are referred to in the argument, excepting the case of Halsey vs. McLean, 12 Allen, 438. We cannot take issue with any of these decisions excepting the latter, which, in our judgment, is antagonized and opposed by every other case referred to by either counsel. In that case, the defendant was sued in Massachusetts as a stockholder of a New York company, (organized under the same act of the Legislature of New York under which the present suit originated,) by a creditor of the company. The court says, referring to the sections of the incorporation act, "These provisions, likewise, have been declared by a New York court (4 Bosw., 417,) not to render the stockholders chargeable as co-partners. The liability for non-payment of the capital stock is limited, in the case of each stockholder, to an amount equal to his stock; and to an action founded on §10, it would be a defence available to any shareholder that he had already paid debts to that amount." And the court was "of the opinion that the liability of stockholders for debts due to laborers, * * qualified, as it is, by the provisions as to the remedy in §24, must be treated as a part of the statute system of

another State, incapable of execution *alieno foro.*" The court does not tell us why, if the shareholders are *not* partners, or chargeable as co-partners; or why if the liability is limited to the amount of unpaid capital stock; or why, if the liability is limited to debts contracted to be paid within a specified time, and conditioned upon a suit being first brought aganst the company within a year after the debt becomes due; why it must follow that the contract cannot be executed *alieno foro.*

Suppose the law of New York limits the liability upon civil contracts made in that State to the term of six years from the accruing of the cause of action, is that such a *qualification* of the liability that the courts of another State will not enforce the contract within six years? Or suppose by the law of New York an action cannot be maintained against a surety, or guarantor, until a recovery against the principal, is that such a qualification of the liability that the courts of another State will not entertain a suit against the surety after judgment against the principal? Or if the liability is limited by statute to a certain pro rata amount of indebtedness, contracted by several individuals, or by a corporation, is that such a qualification that the liability will not be enforced in another State? And yet, if we understand the court in Halsey vs. McLean, it is the opinion of the court that in either of these cases the statute has so qualified the liability the courts of another State will refuse to enforce it. The court further remarks that it regards the principles laid down in Derrickson vs. Smith, (15 Gray, 221,) as applicable to all the provisions of the New York act, which they examined in that case.

Turning to the case of Derrickson vs. Smith, we find that the Massachusetts court refused to entertain a suit where the liability arising under the charter of a New Hampshire corporation could be enforced by the law of New Hampshire

only by bill in chancery, a law which the Massachusetts courts could not recognize as binding upon them, and in the nature of things only valid in New Hampshire, as it prescribed the particular form in which the remedy must be sought, the court holding "that when a statute creates and prescribes a remedy, that remedy is exclusive, and no other can be pursued." We cannot regard the New Hampshire decision as laying down any principle applicable to the case at bar which will preclude the courts of that State from entertaining this plaintiffs' suit. The ruling of the courts of New York, where the company was incorporated, is to the effect that the stockholders are liable by the terms of the act of incorporation, which is the substance of their contract, in the first instance, for the debts of the company, not as insisted by defendant, *upon the failure* of the officers to file their certificate; but are so liable to the amount of their stock *until* the happening of a certain event, for all the debts contracted to be paid within one year after suit and execution against the company in its corporate capacity. These terms are but *limitations* of the liability which was incurred by the contracting of the debt, and do not create liabilities *depending* upon any other event. A statute of limitation is not a qualification of a contract, so that the liability depends upon the happening of any event, but the event or lapse of time merely relieves against a suit; the right to a remedy ceases to exist. The limitation is for the benefit of the stockholder and a means of relief, and not a condition of liability.

A surety may sometimes demand that legal remedies shall be first exhausted against his principal before he shall be compelled to pay,but this is because the surety is already bound, and not because the liability is not fixed by his contract; *that* is operative already, and dependent upon nothing but its own condition. The stockholder here is a surety of the company of which he is a member, and his liability

as a surety is a part of the contract entered into by becoming a member of the company. No event was necessary to charge him as a member except the contracting of a debt to be paid within one year, upon which suit must be brought within one year after the debt is due; and if this is not done he is discharged. This, and the amount of his unpaid stock, merely limit the personal liability upon the contract.

We have seen by the decision of the courts of New York already cited, that the personal liability of the stockholders, when they are made liable by the terms of the charter or act of incorporation, is from the inception of the debt. They are originally liable, and the remedy upon this liability may be enforced after the creditor has exhausted his efforts to collect from the company. Bird vs. Hayden, 1 Rob.; Eaton vs. Aspinwall, 19 N. Y.; Weeks vs. Love, 50 N. Y.; Derrickson vs. Smith, 3 Dutcher, N. J.; Corning vs. McCullough, 1 Comst.; Bank vs. Price, 33 Md.

In Van Riper, ex-parte, (20 Wend., 614,) the court say: "The charter does not confine the creditor to any particular remedy. It raises in his favor a debt against an individual, and leaves his remedy to the general methods of the law. This view also answers another objection, that the remedy given by the charter is local to the State of New Jersey. The charter, in fact, institutes no remedy. It binds Van Riper as a debtor. It raises a debt against him, which may, in its own nature, be enforced wherever the debtor or his property can be found, according to the forms of law at the place where found."

In a suit against a stockholder of the Rossie Galena Company, where, by the charter, the stockholders were "jointly and severally, personally liable for the payment of all debts or demands contracted by the said corporation," but could not be sued until judgment had been recovered against the corporation, and an execution returned unsatisfied, it

is held that the stockholders in their individual, as well as their corporate capacity, were principal debtors. Hayer vs. McCullough, 2 Denio, 119; Moss vs. Oakley, 2 Hill, 265; Bailey vs. Baucker, 3 Hill, 188.

In these cases, as in ex-parte Van Riper, and in Corning vs. McCullough, the individual liability extended to all debts of the company, while in the case at bar the extent of the liability was limited by the charter to the amount of the capital stock owned by the defendant. In neither case is it apparent that the liability is in the nature of a penalty, and there is as much show of reason for classing it as a penalty in one case as in the other.

The defendant's liability as a stockholder, under the articles of association, clearly rests in contract and not in tort, or dependent upon the conduct of the officers or agents of the company, but only upon the non-payment of the debt by the principal debtor, and limited by the amount of his stock. If he has paid any of the debts of the company, that is matter of defence under his contract.

We discover no substantial objection to the form of the allegation in the declaration. The gist of the action is the indebtedness of the company, the suit and judgment against the company unsatisfied, the amount of the defendant's stock and the fact that the liability has not been extinguished by the making and filing of the certificate as prescribed by the articles.

The judgment must be reversed, and judgment entered in favor of the plaintiffs upon the demurrer, and such further proceedings may be had according to law and the practice of the court as the parties may be advised.

On the 16th day of March, 1878, after the adjournment of the court, which adjourned on the 13th day of March, the appellee filed the following petition for a re-hearing:

To the Judges of the Supreme Court:

The appellee in the above cause, the said Adna C. Conn, prays and petitions to your honors for a re-hearing of the above entitled cause, lately, to-wit: on the 13th day of March, A. D. 1878, decided by this court, and assigns as a ground for said petition that there was no final judgment or other judgment in the Circuit Court in the said cause from which a writ of error or appeal could legally be prosecuted or taken to this court; and that this court, in rendering its judgment and decision herein, failed and omitted to consider this fact, and to render its decision and judgment accordingly; and that on this account and for this reason the decision and judgment of this court in said case is, by the petitioner, under the advice of his counsel, believed and supposed to be erroneous. Your petitioner therefore humbly prays and petitions your honors for a re-hearing of the same, and will ever pray.

At the *June Term, A. D.* 1878, the following opinion denying the petition was pronounced by THE CHIEF JUSTICE:

Some days after the adjournment of the last term of this court, during which this cause had been fully argued by counsel on both sides, and a decision made and opinion filed therein, a petition for a re-hearing was filed at the instance of the counsel for appellee. The ground upon which the re-hearing was prayed was that no final judgment had been entered in the Circuit Court from which an appeal or writ of error would lie.

The petition for re-hearing cannot be considered by this court, because it was not presented within the same term in which the cause was decided, nor within any time allowed by the court for that purpose, no such extension having been asked for or allowed. (24th Rule Supreme Court, 1 Fla., 197.) Nor is this a proper ground for praying a re-

hearing. A re-hearing cannot be asked for except upon some ground presented to the court upon the argument. Rule 24.

No question was raised by either party as to the sufficiency of the judgment, or the regularity of the writ of error. Both parties assumed upon the argument that the cause was regularly before the court, and it was submitted for decision upon questions presented and argued by counsel. Immediately on hearing the decision of the court, the counsel for the losing party caused the petition for a re-hearing to be filed. This paper will be allowed to remain on file, and the parties must take such steps as may be appropriate, if it shall be found that the matter suggested in the petition is true.

JOHN O. MATTHEWS, APPELLANT, VS. WILLIAM F. PORTER, APPELLEE.

A deed to land is in the name of, and recites a consideration from B A., who is not the grantor in the deed, seeks, by parol testimony, to establish that the consideration for the land was money which B. had loaned him, and that the deed was a security for this debt. In such a case, where there is a positive denial in the answer, the clearest and strongest testimony must be produced to establish the loan.

Appeal from the Circuit Court for Duval county.

The statement which follows was made by the Justice who delivered the opinion.

This is an appeal from a final decree of the Circuit Court of the 4th Judicial Circuit for Duval county. John O. Matthews brought his bill against William F. Porter, alleging that in 1869 he effected a loan of nineteen hundred and forty-four ($1944) dollars from Porter for the purpose of

paying for a tract of land in Marion county, which had been purchased by him of Charles C. Byrne; that to secure Porter in the repayment of the money so borrowed, with the interest agreed to be paid, the parties entered into an agreement in writing, which is in the custody of Porter, and which, if inspected by the court, will exhibit the state of facts stated; that he directed the said Byrne to execute a deed for said land directly to said Porter, for the purpose of securing him in the repayment of his money; that under the agreement and arrangement mentioned, and after the purchase of the land, and after the deed had been made and executed, he, Matthews, entered upon the land under the agreement, and by improvements greatly enhanced its value; that its value was increased from four to ten dollars per acre, amounting in the aggregate to about three thousand dollars ($3,000) above the original cost, all of which was done with the full understanding with Porter that it was to enure to the benefit of complainant, and that it was understood by the parties that if the amount which was loaned was not repaid as agreed upon, then the defendant was to sell the land and reimburse himself for the money loaned and interest, the surplus to be paid to compainant; that complainant was unable to pay the money as agreed, and that defendant, without any proceedings either at law or equity, sold the land to James A. Harris for the sum of five thousand dollars, ($5,000) and executed a deed therefor. The plaintiff then claims that under the statute law of the State relating to mortgages, Porter holds the amount received from the sale over and above the sum due by him, principal and interest, in trust for his use and benefit. Plaintiff prays a decree for the amount realized by defendant from this sale over and above the sum which he owed the defendant.

The defendant answers: That the plaintiff did in the year 1869 apply to him for a loan of nineteen hundred and forty-

four dollars, ($1944) but that it is not true that he ever effected such loan to pay for the land described in the bill. He denies that plaintiff ever at any time entered into a written agreement with him to secure the payment of said sum, or that he ever loaned him that sum. The defendant then alleges that the transaction which occurred was this: that in March, A. D. 1869, defendant entered into a written agreement with the said John O. Matthews, in which he agreed to sell to him certain lands therein described, and to convey said land to plaintiff by good deed, provided plaintiff should pay for the said land, the purchase-money in said agreement stated, the sum of twenty-five hundred dollars ($2500) at the time therein stipulated, but that Matthews never at any time paid any part of the purchase-money for said land, nor did he perform any of his covenants; that Matthews in the year 1869 made application to him for a loan of money with which to purchase said land, proposing to give a mortgage on the land as security; that defendant positively refused to loan the money, or any part thereof, on such terms. Defendant affirms that he purchased the land through the agency of Matthews as his own land; that said deed was never intended as a mortgage, nor was there any agreement to so consider it; that it is not true, as alleged in said bill, that said Matthews directed and allowed the said Byrne to make the deed for the land for the purpose of securing the defendant in the repayment of the money alleged by Matthews to have been borrowed by him; that the truth was that plaintiff was acting as defendant's agent, and that for such service defendant paid him the sum of ninety dollars. Defendant admits that after his purchase of the land plaintiff entered upon it under the agreement stated. He denies the charge of increased value by improvement, or that the benefit of any increased value was to enure to plaintiff, except as stated in their agreement, and affirms that plaintiff failed to keep his covenants.

There is in the record an agreement that certain papers should be received without further proof, and that they are the only proof. This agreement plaintiff paid no attention to, nor did the court enforce it, but in view of the conclusion reached upon the other testimony admitted, its effect is immaterial.

The testimony deemed material was as follows:

Testimony of Matthews.

The plaintiff, the first witness examined, testifies substantially, "that in the year 1869 I concluded a trade with C. C. Byrne for a tract of land on Orange lake, in Marion county, at the rate of $4 per acre, cash, amounting in the aggregate to $1,944; that not having the cash I induced Mr. Porter, of Brighton, Mass., to look at the property; that Mr. P. agreed to advance the money to Mr. Byrne; that the deed should be taken in my name, Porter to take a mortgage from me for the purchase-money; that Mr. P. subsequently declined to advance the money as he had agreed to do; that I then went to Mr. C. L. Robinson & Co., real estate dealers and loan negotiators, and applied to them to introduce me to a gentleman who had money to loan; that Mr. P. introduced the defendant 'as a gentleman who had money to loan;' that I advised Mr. P. of the trade I had made with Byrne; that after describing the property I told Mr. Porter that I would pay two per cent. per month for the money if he would loan it to me; that Mr. P. visited the property, agreed to loan me the money, and let me take the deed to the property from Byrne, and that he, Porter, would take a mortgage with interest at the rate of two per cent. per month; that Porter returned to Jacksonville, and that shortly after I went to the same place to consummate the agreement; that Mr. Porter then said he had changed his mind, that he would take the deed in his own name, and would give me an agreement so that my rights would be

protected just as well as if I took the deed. I remonstrated, telling him that he was aware that Dr. Byrne had determined that if the trade was not consummated in a given number of days to break up the negotiation and decline to sell, and that I did not have time then to exhibit the property to any other person, and I would lost the trade; that the defendant replied, 'God knows, Mr. Matthews, all I want is two per cent. for my money, with good security'—he said this with his right had uplifted. He further said he was in doubt as to the effect of homestead laws on a mortgage, and that he would make no loan in that way; that being afraid I would lose the trade I was compelled to submit to his terms; he further stipulating, however, that I was to pay two per cent. per month, the taxes, ten dollars of the twenty due for lawyer's fees for executing title and writing agreement between Mr. Porter and myself, and that I was to let him have at any time within two years 2000 wild orange trees. I think this agreement was reduced to writing. I know an agreement was reduced to writing which embraces all the points already testified to." Then follows a statement as to place of deposit of this agreement, and its history—all of which is immaterial in view of the fact that the agreement was put in evidence by the defendant. That the original amount he agreed to pay Dr. Byrne was $1,944, the sum for which Mr. P. states he agreed to sell the land; "that the interest on this sum at two per cent. per month, with $90 which Mr. Porter advanced me, made up the sum of $2,500." The $90 was paid me by Mr. L'Engle out of a draft of $100, which Mr. P. sent him. "After the deed and contract were made I entered upon the land and employed a party for two seasons cutting off wild orange trees, and advertised the land as for sale by me extensively. In the full of 1871 or spring of 1872, I received a notice from Mr. Porter to quit the premises. I had never resided on the tract. I subsequently demanded the difference between the

price Mr. P. received and the $1,944, with interest at two per cent., which Mr. Porter refused, denying that I had any right to it. The positive agreement between Mr. P. and I was that he was to loan me the money and take the deed as security, he stating that he was afraid of the decision of the courts as to the effect of homestead exemptions upon a mortgage. No other written agreement except the one mentioned was made between us, and the two per cent. per month for one year on $1,944 was added to that sum in the agreement which Porter made to convey the land to me. Porter sold the land for $5000; it was considered a very valuable tract; I did not know of the sale before it was consummated; at the time I made the trade with Byrne I had been in the State about eighteen months; I was to have three years, with the promise that I was to pay a given sum annually, about two per cent. per month; I think the sum was $500. There was an agreement between us on the night before the papers were signed that the defendant should give me a bond for title; when we went to the office of Sanderson & L'Engle (attorneys) the next morning, instead of what I regarded as a bond, the agreement I have testified to was drawn up; I objected to signing it as it was not what was agreed upon, but Porter said the agreement drawn up was just as good to protect my interest as a bond for title would be, and it was what he wanted. At the time the land was sold to Mr. Harris I valued it at $40,000; Geo. R. Hall offered me $50 per acre for a portion of it." Other offers are testified to, but they are not deemed material as they do not relate to the time of the purchase from Byrne.

The testimony brought out upon the cross-examination is immaterial, except that the agreement between the parties which, upon the first page of the opinion of the court, is produced and identified by the witness as the agreement executed by them, and he positively denies any agency for Porter. Some time elapsed between the execution of the

agreement and the execution of the deed by Byrne, as a prior deed was informally executed and returned.

Testimony of C. L. Robinson.

"I am a real estate broker in Jacksonville; have been so for nine years. I introduced the plaintiff to the defendant. I knew the defendant to be a man of capital, and that he was not disinclined to invest in Florida either in loans or purchases. He was loaning money about that time. As to the transaction in real estate in Marion county, I know that parties had such transaction; all the details I do not know. The transaction was had, or much of the conversation was had, in my office, in regard to what I considered at first to be a loan between the parties. I saw a deed made between Dr. Byrne and defendant. It was not the deed finally delivered, and I left town before the final deed was delivered. Before the delivery of the deed I did understand the transaction was to be a loan, or what was to have the same effect as a loan. I heard several conversations between them in regard to it. The defendant looked at two or three important places with a view of purchasing lands. Some of the conversations I heard occurred after the visit to the lands. All of it that I heard was to the effect that the place was purchased by Mr. Matthews or for his benefit, making it a loan. I think I kept the contract as to this land between the parties in my office for many weeks, but never examined it thoroughly. I don't remember the circumstances under which the contract came into my possession."

The testimony of George R. Hall is simply to the effect that he never made any positive offer for the land to Matthews.

A. S. Baldwin testifies that he was the agent of Dr. Byrne; that he advised Mr. Matthews that unless the money agreed upon, as a cash price, was paid within a certain time the

proposition would be withdrawn. Dr. Byrne was very impatient.

Testimony of Porter.

"I did not loan the plaintiff $1,944 to purchase the land in question. Mr. Matthews spoke to me of this land, and offered to pay my expenses up to it and back if I did not admit that the land was as good as any in the West. I visited the land, but declined to make a loan for its price unless he would pay ¼ or ½ of the purchase money. I finally made him the proposition that I would buy the land direct from Byrne, pay the amount he was to pay and $100 for his trouble, he to pay one-half the expenses of a proper agreement between us, and he finally accepted that proposition. He still wanted his chance to buy the land back of me. We made an agreement which was finally reduced to writing. I never agreed in any shape or form to loan him any money to purchase that land. The next day after our talk of this agreement we went to the office of Messrs. Sanderson & L'Engle and had the agreement drawn up, and the next day, March 26, I left Jacksonville. About the middle of April I sent a draft to the order of C. C. Byrne for $1,944. A short time after this I sent a draft for $100, $90 of which was paid Mr. Matthews and $10 paid Mr. L'Engle. The $90 was paid Mr. M. for his services." He denies making to Matthews the statement as to interest which Mr. M. swears to. Matthews made no improvements upon the land. He states that he made no loan in the spring or winter of 1869, except one of $500 to plaintiff. "I did not think that $2,500 was more than a fair equivalent or profit for me to make for buying the land and holding it a year, he having the privilege to take up and sell wild stumps, as stated in the agreement. I arrived at this by no particular calculation. I did not look upon it as any particular rate or per centage. The tract, including expenses and what I paid plaintiff, cost close up to $2,100. There was no other agreement than the

one in evidence. Before the agreement was reduced to writing Mr. Matthews wanted the land on better terms to himself, but after the agreement was written, as that contained the only terms upon which I would buy the land, Mr. M. did not object. At the commencement I declined under any circumstances to take a mortgage for the full amount. Plaintiff paid the taxes for one year."

This is substantially all of the testimony of this witness deemed at all material. There is other testimony as to the opinion and advice of counsel in the premises, which is irrelevant and immaterial.

The other facts of the case are stated in the opinion of the court.

H. Bisbee, Jr., for Appellant.

The proposition of appellant is, that a transaction which was really intended as a security for money loaned is in equity a mortgage, no matter how artfully the writings between the parties may have been drawn to make it appear a sale. 1 Hilliard on Mortgages, 69, §1; id., 70, 71, 72; Russell vs. Southard, 12 How., 139, 148, 149.

In Russell vs. Southard, the court said: "The deed (absolute) and memorandum certainly import a sale; the question is, if their form andt erms were not adopted to veil a transaction differing in realty from the appearance it assumed."

In this case stress was laid by the court upon the fact that the price paid was not adequate for the real value of the land. Id., 149, 150, 151.

Also that one witness understood the transaction to be a loan and mortgage, and not a sale. Both of these elements are in the case at bar.

In the case of Russell vs. Southard, the answer set forth a complete, absolute, and unconditional sale; but the court

held it did not overcome the facts and circumstances tending to establish a loan of money. (Id., 151, 152, 153, 154.) Every sentence of the opinion of the court in this case is applicable and decisive of the case at bar in favor of appellant.

In Morris vs. Nixon, (1 How., 118 and 119,) the court said: "Where there is proof of parties meeting upon the footing of borrower and lender, with an offer to secure the lender by a mortgage upon particular property, if a deed of the property absolute on the face of it be given to the lender, and the lender also takes a bond from the borrower, equity will interpret the deed to be a security for money loaned, unless the lender shall show by proofs that the borrower and himself subsequently bargained upon other footing than a loan."

In the case at bar, defendant's answer expressly admits that the parties meet upon the footing of borrower and lender, with an offer to secure the lender by a mortgage upon particular property.

The burden of proof, then, is shifted to Porter to prove that he and Matthews subsequently bargained upon another footing. He does not do this, but on the contrary it appears that they never treated with each other as to the price or value of the land. 16 Ala., 501.

The case of Babcock vs. Wyman (19 Howard) is to the same effect. The deed was absolute, and there was no agreement in writing to reconvey or treat the transaction as a mortgage. The grantee sold the property, and was decreed to account to the grantor for the excess above what the grantor owed the grantee. 19 How., 289, 299, 300.

All the cases above cited affirm the doctrine that parol evidence is admissible to prove that a deed absolute upon its face was intended as a mortgage upon a general averment that it was given for that purpose. Vide 1, 12, 19

Howard, and cases cited; 2 Cowen, 329; 1 Johns. Ch., 167; 1 Hill, p. 50, sec. 111.

The same doctrine applies in case of separate defeasance, and equity will permit a party to restrict his right of redemption, and then allow a lender to be a chancellor in his own case and prevent the judgment of the court. 1 Hil. on Mortgages, 4th ed., 72-73.

The testimony of Porter himself shows that the agreement recites a falsehood, to wit: that Porter "was negotiating a purchase of the land in question." This was artfully contrived, supposing it would estop Matthews from denying the fact, and conclusively bind him to admit that Porter did negotiate the purchase when in truth he did not. This agreement makes Matthews appear to be a tenant paying rent instead of interest. These are artful contrivances of the greedy money-lender and cannot avail him.

"If in equity it is admitted or proved that one of the documents in a transaction was not intended to be what it purports, it subjects other documents in the same transaction to suspicion." 1 How., cited supra, 119.

That the borrower has agreed to pay rent so called instead of interest does not affect his right to relief. 1 Hil., 74, 75, 66; Walling vs. Aiken, 1 McMullen Ch., 1; Spurgeon vs. Collier, 1 Ed., 55; Bloodgood vs. Zeily, 2 Caines Cas., 124; Bently vs. Phelps, 2 Wood & Minot, 426; 39 Ala., 158.

Nor does the fact that the borrower never had the legal title in himself affect his right to redeem, if in fact he was the purchaser of the equitable right. 1 Hil., pp. 74-75, sec. 7; Walling vs. Aiken, 1 McMullen Ch., 1, note *a;* Pennington vs. Hanby, 2 Mumf., 40; Spencer vs. Fredenall, 15 Wis., 666; Rogan vs. Walter, et al., 1 Mis., 566, 568, 569.

"Equity will construe a conveyance as a mortgage rather than a conditional sale, if the language used and the circum-

stances of the case will admit such construction." 1 Hil., 101-102; 4 Kent, 143; Rich vs. Doane, 35 Vermont, 125; Tucker vs. Lindsey, 18 Iowa, 504; McNeil vs. Norsworth, 39 Ala., 156; 33 Ill., 475, 476, 479; 35 Ala., 334; 1 Wis., 566.

"Where defendant answers, and by his answer sets up an absolute sale to himself, he cannot be permitted to set up in defence in argument a conditional sale," and such a departure from the facts will deprive his answer of all weight as evidence on this part of the case. Russell vs. Southard, 12 How., 152.

Peculiar cases where the transaction was held to be a security for money: Merritt vs. Judd, 14 Cal., 59; 4 Cal., 97; 13 Ind., 129; 25 Vt., 558; 5 Mich., 231; 46 Ill., 451; 31 Pa. St., 295; 31 Pa. St., 131; 22 Cal., 330; 1 Paige, 617; 3 Jones Eq., 427, 429; 8 N. J., 4 Halst., 206; 2 Dev. Eq., 470; 38 Ill., 400; 26 Conn., 213; 34 Vt., 166; 31 Conn., 1.

In all cases of doubt the court leans to the conclusion that the reality was a mortgage and not a sale. 12 How., 152; 7 Cranch, 218; 2 Sumner, 533; 2 J. J. Marsh., 471; 3 J. J. Marsh., 354; Crane vs. Bonnell, 1 Green Ch., 264; 1 Dev. Eq. Cas., 373.

Porter himself had doubts about his right to sell, and applied to lawyers for advice. *Vide* Porter's testimony.

ESTOPPEL.

It may be claimed that Matthews is estopped from denying that Porter negotiated the purchase from Byrne, because it is so recited in the agreement.

But Porter's own testimony shows that the recital is untrue, and that the ageeement is made to speak falsely for the very purpose of creating a false statement over Matthews' signature to injure and defraud him.

This recital is fraudulent, and parol testimony is admissible to show the truth, on the same principle that such testi-

mony is admissible to show that a deed was intended as security.

Besides, where two parties sign a deed, particular words of recital may be the words of one party only. Herman on Estoppel, sections 242, 252, 244, 266, 268.

Estoppel will be suppressed when it would produce fraud, its object being to prevent fraud. Id., sections 243, 269, 240, 231; 12 How., 145, where contract states that complainant had sold to defendant.

Pattison & Meek for Appellee.

Construction of Contract.—"A distinction is to be observed between the construction of a contract and the correction of a mistake." 2 Parsons on Contracts, 5th edition, page 496.

The complainant does not, either in his bill or in his testimony, claim that a mistake was made, but relies upon the contract of March 25, as expressing in the fullest sense the intention of the parties (complainant and defendant) thereto. But if it were contended by the complainant that a contract was made by him which he did not intend to make, even then a court of equity would not interefere and permit him to set up "a contract which the parties intended to make, but did not make, in the place of one which they did make but did not intend to make." Parsons on Contracts, 5th edition, Vol. II., page 497.

Neither complainant nor defendant pretend that the contract of March 25, 1869, and in proof in this cause by the consent of both parties, was a contract that he, the complainant, did not intend to make, but, on the other hand, both complainant and defendant rely upon said contract as expressing just what both intended in the premises.

The Purpose of Construction.—"Indeed the very idea of construction implies a previous uncertainty as to the mean-

ing of the contract, for where this is clear and unambiguous there is no room for construction, and nothing for construction to do." Ibid., page 500; Story's Eq. Jur., Vol. 1., Secs. 153, 54, 55, 56, 57, &c.

In this cause the said contract speaks for itself. Nor does the complainant, either in his bill or in his testimony, claim that the contract is ambiguous and uncertain, but in both his bill and in his testimony he relies upon it as expressing his intention.

The Effect of Defendant's Answer.—"The plaintiff, to answer an allegation which he makes, thereby admits the answer to be evidence. In such case, if the defendant in express terms negatives the allegations in the bill, and the bill is supported by the evidence of only a single witness affirming what has been so denied, the court will neither make a decree, nor send the case to be tried at law, but will simply dismiss the bill." 1 Greenleaf's Evd., Sec. 260; also 3 Greenleaf's Evd., entire Sec. 248.

There is no witness but the complainant who attempts to affirm what is denied by the answer, and the material parts of his testimony is but a restatement of the allegations of his bill; all else is outside the bill, and is contradicted by the defendant and Doctor Hall. The answer denies, totally denies, every allegation of the bill.

The written contract of March 25, 1869, already referred to, and part of the proof in this cause, creates a tenancy for years, as well as a pledge or bond for a deed, as it is commonly called, upon the performance of the covenants therein.

By the terms of said contract the time for paying the purchase money for the land in question is extended one year upon the payment of $500 yearly rent in advance. This the complainant failed to do, and after a reasonable time had elapsed the defendant notified the complainant, as a tenant, to quit the premises, which he did. This appears from the testimony of both complainant and defendant.

From the proof on file complainant had it in his power to pay the whole or part of the purchase money, or at least the yearly rent of $500 in advance, and thereby extend his time of payment of purchase money by the sale of products grown on the land scrip. The latter he declined to sell at less than its then cash value.

Complainant claims that the deed from Byrne to Porter was a mortgage from complainant to defendant, or to have the effect of such mortgage. This cannot be. All the leading cases where a deed, absolute on its face, has been adjudged by the courts of last resort to be a mortgage, have been where the parties, vendor and vendee, or their legal representatives, have been the litigants. The facts, as stated, are wholly different from those of the case at bar.

Those cases show in every instance an oppressed debtor in the hands of a merciless and advantage-taking creditor, and in one or two instances the borrower in a debtor's jail.

The facts, as they appear in the case at bar, that the complainant is an anxious land speculator and desires to carry on his business as such at the expense of the defendant.

"To give the effect of a lien to the possession of the deeds, it must be shown affirmatively that they were deposited as a *bona fide* present, immediate security." 1 Wash. on Real Property, page 534.

But if the deed for the land in question was direct from Matthews to Porter, in connection with the said contract, even then we contend the deed would not be a mortgage, but a sale absolute with a conditional agreement to reconvey. In support of this position we would respectfully call the attention of the court to the following authorities:

"A. granted to B. in fee for $7,000, and B. by another instrument leased to A. for one year, and covenanted to reconvey to him for $8,000 at A.'s election within the year. *Held,* An absolute sale, with a conditional agreement for a reconveyance. Where there is no debt or loan, an agree-

ment to resell does not change an absolute conveyance into a mortgage." 2 Edw., 138; 2 Ball & Beatty, 274; 2 Sch. & Lefroy, 393; 1 Vt., 268; Vin. Abr. Mort. U., 8; 7 Cranch (2 Curtis), 218; 4 Kent's Com., 144; Sugdon on Vendors, 223; 1 Powell on Mort., 130.

"A mere agreement to re-convey the premises within a limited period upon the repayment of the consideration money, or any other sum, where there is no subsisting debt or continuing liability of the grantor for the payment of the money, either express or implied, is not sufficient to convert such a conditional sale into a mortgage." 19 Wend., 578; 2 Edw., 138; Holmes vs. Grant, 8 Paige, 243.

"A conveyance, in consideration of the discharge of previous debts, with an agreement that the purchaser shall convey to the vendor, upon his paying a specified sum at the end of one year, together with the value of the improvements made in the meantime; *Held,* An agreement of sale and repurchase and not a mortgage." Robinson vs. Cropsy, 6 Paige, 480, affirming 2 Edw., 138.

"Where a creditor, having a demand to about the value of the land, received a conveyance of it from the debtor in discharge of the debt, giving him as a separate transaction a stipulation that if he could find a purchaser in a year he should have the purchase money beyond the debt and interest; *Held,* That the transaction was not a mortgage." Holmes vs. Grant, 8 Paige, 243.

"A debtor conveyed absolutely to his creditor, in payment of the debt, the creditor covenanting to convey on the request of the former within the year, retaining only a certain amount of the debt and interest, and that if the land could not be sold within the year he would pay the debtor such further sum for it as might be awarded by arbitrators; *Held,* Not a mortgage but a sale, and, therefore, proof of usury in the consideration was not admissible to avoid it." Baker vs. Thrasher, 4 Den., 493.

"A conveyance to one who agreed to pay off incumberances, and to reconvey on being repaid; *Held,* not a mortgage." Grinstone vs. Carper, 3 Paige, 421.

"When the owner of a bond and mortgage, made by a third person, applies to another to make a loan on the security thereof, who refuses to do so, but purchases them at less than their face and takes a transfer, which recites a sale at a sum named and conveys them in pursuance thereof, the transaction will not be treated as being in effect a mortgage, merely because the purchaser gives his covenant to the vendor to resell them to the latter within a time named and on conditions specified. In the absence of all evidence of the inadequacy of the consideration paid, and of any personal liability of the vendor to refund, in any event, the money received as the price of the transfer, the covenant will be treated as a conditional sale." Querk vs. Rodman, 5 Duer, 285.

"To convert a deed absolute on its face into a mortgage, a contract to that effect must be clearly proven." Supreme Court of Penn., 1875; Plummer vs. Guthrie, cited in Central Law Journal, page 67; 76 Penn. State R., page 441.

Neither bill, answer nor proof in this cause disclose an existing debt owing by complainant to defendant.

Second. Neither was there a loan pending, and the only loan referred to in the proof was the one that for some time previous to the transaction in question had been closed up by the complainant giving mortgage security on lands on the Ocklawaha river.

From all the facts in this case the complainant is not entitled to the relief he seeks and prays for in his bill, upon the principle that until he does equity he is not entitled to equity.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

On the 25th day of March, A. D. 1869, articles of agree-

ment were mutually signed by the parties to this controversy, as follows:

"Articles of agreement made the 25th day of March,in the year eighteen hundred and sixty-nine, between William F. Porter, of Brighton, Massachusetts, of the first part, and John O. Matthews, of Marion county, Florida, of the second part: whereas, the party of the first part is negotiating for the purchase from one C C.Byrne of the following lands, viz: Lots numbers one, two, three,four,six and seven,in section twenty-two of township twelve south, of range twenty-two east, containing one hundred and ninety-eight 45-100 acres; also lots numbered one, two, three, four, five and six, in section twenty-one of township twelve south, of range twenty-two east, containing two hundred and eighty-seven 72-100 acres—all in Marion county, Florida. Now, if the said negotiation should be successsful, and the party of the first part should effect the purchase of lands aforesaid, then and in that case only these parties contract and agree each with the other as follows, to-wit:

"The party of the first part covenants and agrees to execute and deliver unto the party of the second part, his heirs, executors, administrators or assigns, (at any time,on demand, within twelve months from the delivery to the party of the first part, or his agent, of the deed for said land by said Byrne,) a good and perfect conveyance in fee simple for the said lands, free and discharged from all claims for dower on the part of the wife of the party of the first part; provided and upon condition nevertheless, that the party of the second part, his executors, administrators or assigns, pay to the party of the first part, his executors, administrators or assigns, for the said lands, within the said twelve months, the sum of two thousand five hundred dollars, lawful money of the United States.

"It is further agreed between these parties, that if the party of the second part should fail to make said payment

within the said twelve months, that then and in that case the time for such payment and the operation of this agreement shall be further extended, from year to year, for a period not exceeding two years, on condition that the party of the second part shall, before such extension be made, pay to the party of the first part five hundred dollars for the rent of said lands for the first year, after the expiration of the said twelve months, and at the end of that year the further sum of five hundred (500) dollars for the rent of the lands for the second year.

"It is further agreed that the party of the second part shall, during the continuance and operation of this agreement, have the right to dig up and remove from said land such wild orange trees and shrubs as he pleases, on the condition that he shall leave at reasonable distance for an orange grove one hundred orange trees on each acre that he removes trees from, and shall bud with sweet orange buds the said trees, and care for and cultivate them.

"It is further agreed that the party of the first part shall have the right at all times, within three years from the time this agreement takes effect and commences to operate, to remove for his own use, but not for sale, twenty thousand wild orange trees or shrubs from said land, provided he leaves standing at distance apart, suitable for an orange grove, one hundred trees on each acre from which he removes trees; and, provided further, that he shall pay to the party of the second part twenty-five dollars for such trees in case the party of the second part perfect the purchase of said land."

The other portion of the instrument is merely formal, except that Matthews subsequently covenants that he "shall, during the continuance of this agreement, pay all taxes and legal assessments now due or to become due on the lands herein mentioned."

On the 25th day of May, 1868, Charles C. Byrne, for him-

self and as attorney in fact for the other owners of the land, executed a deed of conveyance, reciting a consideration of "one thousand nine hundred and forty-four dollars to them in hand paid by William F. Porter, of Brighton, in the State of Massachusetts," and conveyed all of their interest in the land to Porter. On the 2d day of January, A.D. 1871, Porter and his wife, in consideration of five thousand dollars to them in hand paid by James A. Harris, executed a deed in fee simple to the property to him. After notice to quit by Porter to Matthews, Harris obtained possession.

The foregoing papers give the proper title to the land in controversy, as well as the transactions between the parties, so far as they are shown by written evidence having any important bearing upon the subject. It is admitted that Matthews, at the time of the notice to quit, and when the deed to Harris was executed, had failed to comply with his covenants. Upon the face of these papers all the interest which Matthews had in the land was a conditional tenantry, with the right to purchase for a given sum within a stated time. Having failed to perform his covenants, his interest, which was conditional, ceased upon their non-performance, in accordance with the terms of the agreement. Upon the face of these papers he has no equity. The only absolute property which he was to have was conditional under this agreement, the conditions of which he failed to perform.

While this is the clear legal effect of these instruments, the plaintiff contends that under color of these deeds, and in fact and in truth, the true transaction was not as here disclosed. His position is that the money, which was the consideration for this land, was borrowed by him of the defendant; that the deed was taken in defendant's name to secure the re-payment of the same; that the defendant took advantage of his necessities and distresses taking an absolute deed; that the true transaction was a mortgage; that in equity he had the right to redeem, and that upon the sale of the land

he is entitled to the difference between the mortgage debt and the purchase-money received by the defendant.

The general rule that parol evidence is admissible to show that what appears upon the written papers to have been an absolute sale of property by A. to B. was in truth and in fact a mortgage to secure a loan of money by B. to A., and where there is evidence of a loan, of distressed circumstances of the borrower, and of inadequacy of the consideration, courts of equity incline to consider the transaction a mortgage. This is the legal proposition which the citations of the appellant here established. Russell vs. Southard, 12 How., 145; Morris vs. Nixon, 1 How., 118; Babcock vs. Wyman, 19 How., 289; 2 Cowen, 324; 4 Mumf., 140; 2 Mumf., 40; 15 Wis., 666.

The difference, however, between all of these cases and the case under consideration is, to our minds, manifest and material, even accepting the facts to be as stated by the plaintiff himself. At the time the articles of agreement were executed between these parties (March 25th, 1869,) neither the plaintiff nor the defendant had any interest, legal or equitable, in these lands. The property was then owned by Byrne and others, whom he represented. Byrne had offered to sell the land to the plaintiff for $1,944. The plaintiff had accepted the offer, and the agent of Byrne had advised him that unless the money agreed upon as a cash price was paid the offer would be withdrawn.

In all of the cases above referred to the plaintiff was dealing with property to which he had title, legal or equitable, which he could make the subject of a mortgage, and which he could tender as security for a loan. There is a manifest difference between Porter's negotiating for an interest in the property of Matthews and an application of Matthews to Porter to loan him money to buy property belonging to some one else. This is the difference between the facts in the cases cited and the facts here.

There is another material difference. In all of the cases where an absolute deed was held to be a mortgage,there was a difference in the value of the property covered by the deed and the consideration which passed. Accepting the evidence of the plaintiff himself here,we find that the price paid was that fixed by the owner of the land *at the time* as the cash sum for which he was willing to sell his entire property in it, and that another party (Mr. Porter) had declined to take it as security for a loan for that amount. It is true that the plaintiff testifies to a greatly enhanced value subsequently, as well as to subsequent offers of a much larger sum per acre than it cost; but admitting the truths of these statements, (and in one of them he is contradicted by Hall, a disinterested witness,) it is clear that the value, *at the time of the contract,* is the material fact.

There is still another difference. Matthews was not in enbarrassed or distressed circumstances; he was endeavoring to borrow money to buy land; he was seeking to borrow money to enter into a speculation; he was not a debtor in jail wishing to borrow money upon a pledge of property; he was not threatened with legal proceedings looking to his imprisonment for debt or likely to result in any sacrifice of property; his position was not one of distress or embarrassment, within the meaning of the authorities controlling the subject.

In referring to the authorities cited by the appellant we have omitted two, because the points of difference between them and this case are not of a similar character to the points of difference between the cases referred to above and this. These cases are Rogan vs. Walker, 1 Wis., 568, and Walling vs. Aiken, McMullen's Eq., 14. In the first case the court held that the deed and bond executed by the parties vested in Rogan a right of redemption. In disposing of the case, the Justice, delivering the opinion, says: "The relations of the parties and their respective rights, as hereinbefore stated,

result inevitably from the deed and bond recited in it. I have been unable to put any other construction upon it. The view taken of it by the counsel for the defendant, it seems to me, is in direct conflict with the very terms of the instrument, and there is nothing in the transaction as developed by the recitals or language of the deed that would authorize a different construction than that which the very words imply." In addition to this, Rogan had a settler's claim to the land, "such as under the circumstances was necessary for Walker, such as he did recognize the profit by." The release of such a claim has been held also by the Supreme Court of Iowa to be a sufficient consideration for an advance of the purchase-money and the creation of a trust. 3 Iowa, 527.

It certainly will not be contended in this case that upon the face of the deed of Byrne, and the agreement between the plaintiff and defendant, there was a right of redemption in Matthews. Nor can it be contended that upon the face of these papers there is anything to establish either a resulting or constructive trust.

In the other case, Walling vs. Aiken, the relation between the parties was determined by the nature of the written agreement and deed between them. Says Chancellor Harper for the court, "the conveyance of the lands, connected with the written agreement between the complainant and the defendant, constitute a mortgage or security." There is no pretence that this can be said of the written agreement and deed here.

Where there are such differences, the judgments of courts in the one case cannot control in the other, and this disposes of the theories and citations of the plaintiff.

Most of the citations of the defendant go to show in what cases a transaction is held to be a conditional sale and not a mortgage. As to this we remark that under no possible reasonable construction of the facts in this case is there a

sale by defendant to plaintiff, either conditional or otherwise.

With these comments on the case, as presented by the parties, we consider the case as presented by the record. The basis of the claim of the plaintiff is his alleged purchase of Byrne, and the payment of the consideration for the deed. If there was in fact a loan of nineteen hundred and forty-four ($1944) dollars by defendant to the plaintiff in this case, and the conveyance for the land for which this money was the consideration was taken in the name of the defendant, these facts presented above, independent of the prior agreement of the parties and the other evidence, would constitute a resulting trust. The defendant would be a trustee, and would be subject to the liabilities, legal and equitable, of trustees in a like position, and if it was the intention of the parties, in view of all the evidence, that the defendant was to hold this land as security for the amount stated in the agreement, and as security for debt, we are inclined to the view that upon these facts the plaintiff would not be without equities. What these equities would be we do not propose to declare, unless the case presents that question, and we therefore inquire, does this record present that case, and if not, what case is presented upon the pleadings and proofs? The first question to be here determined is, what are the rules of evidence where, contrary to the express language of the deed and the denial of the defendant, the plaintiff seeks to prove the fact that the money was his, and thus establish a resulting trust for his benefit? Having fixed this rule, its application ends the consideration of this case.

Such a trust is not within the statute of frauds, and may, under the circumstances stated, be proved by parol testimony, but the evidence is to be received with great caution.

In the case of Boyd vs. McLean, (1 John. Chy., 590,) Chancellor Kent, in discussing this question, says: "The

cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof as tending to perjury and the insecurity of paper title, and they have required the payment by the *cestui que trust* to be clearly proved. In the case of Lench vs. Lench, Sir William Grant did not deem the unassisted oath of a single witness to the mere declaration of the trustee admitting the trust as sufficient, and there were no corroborating circumstances in the case. He thought the evidence too uncertain and dangerous to be depended upon. It would be easy to multiply instances of the like caution and discretion, and the only inquiry is whether here is not convincing and satisfactory proof of the *loan* to the plaintiffs, and consequently the payment of the consideration in the deed with *their moneys*." It is unnecessary to multiply extracts from parallel cases establishing this rule. In the cases following it is held that in such a case as this, "the clearest and the strongest testimony must be produced." 2 Blackf., 198; ib., 440; 1 Dana, 536; 13 Mrld., 257; 3 Iowa, 371; 1 Wend., 625; 2 Wend., 570; 1 Barb. Chy., 499.

Controlled by this rule we ask, is the trust here established? In the first place, it is not denied that the money which Byrne received was paid by defendant. Porter gave a draft upon his own money in favor of Byrne. Again, there is no note or obligation given by plaintiff to defendant making this sum a debt due to defendant. Just here we may remark that some of the courts hold that "if the party claing the resulting trust has paid no money,he cannot show by parol evidence that the purchase by absolute deed and for a valuable consideration was made for his benefit." (T. & B. on Trusts, 447; 3 Ind., 308; 27 Penn. St., 180.) But it is insisted that the money thus paid by defendant was really lent by him to plaintiff; that it was a payment for plaintiff; and without reference to the distinction suggested in these cases, we examine the evidence and case.

Looking to the pleadings, we find that the plaintiff in his bill alleges that the money ($1944) was lent to him by the defendant; that he made the purchase of the land with it and agreed to pay interest thereon. He then affirms, "all of which will fully appear in and under the said agreement entered into between this complainant and the said defendant, which was reduced to writing, which said writing is now in the custody, control, and possession of the said defendant, the said Wm. F. Porter, which, if inspected by the court, will exhibit the same state of facts herein set up, and which is prayed the said defendant may be required to produce." The plaintiff alleges further that he entered upon the land under the agreement between him and Porter. The defendant answers that the plaintiff applied to him for a loan of $1944, but that it is not true that he ever effected such loan. He admits the execution of an agreement in writing with the plaintiff, wherein he agreed to sell the land to him upon his payment of the purchase-money therein agreed upon. He further says that plaintiff paid no part of the purchase-money, and that he has failed to perform his convenants. Defendant also alleges that he purchased the lands of Byrne through the agency of Matthews; that the deed was made to him as such purchaser, and that he paid Matthews for his services as such agent the sum of $90. It thus appears from the plaintiff's case, as stated by himself in his bill, that his contract and agreement with the defendant was reduced to writing, and he expressly affirms that this instrument of writing "will exhibit the same state of facts" that he sets up as the basis of his equities. This agreement was not in his possession. He was here speaking from his recollection of its contents. He rested his case upon its written stipulations and recital, and asked its production. The agreement was subsequently produced. It is inserted in the beginning of the opinion. A reference to it will show that it does not recite these facts, but that on the con-

trary it recites a negotiation by the defendant with Byrne for the purchase of the land, and that the agreement is to sell the lands to plaintiff upon the terms stated, of one of which, the express condition is that the defendant should effect the purchase. Upon the bill and answer above, coupled with this agreement, therefore the plaintiff has no case. We will, however, go further and examine the testimony. The first witness is the plaintiff himself. He states that he was introduced to the defendant as a gentleman who had money to loan; that he visited the land with him; that defendant agreed to lend him the money to purchase it, the defendant insisting finally that the deed should be in his name, and that he would give an agreement so that plaintiff's rights would be protected. He then states, "I think this agreement was reduced to writing. I know an agreement was reduced to writing which embraces all the points already testified to." Here then he rests his case upon the agreement not then before him. He speaks from memory. The agreement produced, his case vanishes. To say the least, he has made a great mistake in his own favor when in pursuit of property claimed by another. How forcibly does this case impress upon us the importance of strictness in the rule as to explaining written agreements by parol testimony. This witness, in stating the final agreement between himself and defendant, says: "There was an agreement between us on the night before the papers were signed that the defendant should give me a bond for a title. When we went to the office of Sanderson & L'Engle, attorneys, the next morning, instead of what I regarded as a bond for title, the agreement I have testified to was drawn up."

All of this occurred before Porter paid the money to Byrne, and before the plaintiff had any interest in the land. It is not seen how plaintiff could have expected a bond for title from the defendant, except upon the hypothesis and understanding that the defendant was

to acquire a title. It certainly was not expected that he would contract to give a bond for a title that he was not to acquire. This clear admission is inconsistent with the idea that the plaintiff was to pay for the land with borrowed money, and is entirely consistent with the view that the final agreement and determination was for Porter to purchase the land for himself, availing himself of the offer of Byrne to Matthews. There are other matters which might be alluded to in the testimony of this witness, but enough has been said to show how entirely unreliable it is, as well as to establish that there is nothing in it to clearly prove the fact that the consideration for the deed was money borrowed of the defendant by the plaintiff.

C. L. Robinson, the next witness for the plaintiff, testifies that he knew the plaintiff and defendant had transactions as to real estate in Marion county, but that he did not know all of the details; that much of the conversation was had in his office in regard to what he considered "at first" to be a loan between the parties; that before the delivery of the deed of Byrne to Porter, he understood the transaction was to be a loan; that all of the conversation that he heard was to the effect that the place was purchased by Mr. Matthews, or for his benefit, making it a loan; that he kept the written contract between the parties in his office for many weeks, but never examined it thoroughly. This testimony is not inconsistent with the fact that the final transaction between the parties was not a loan. This witness expressly states that he did not know all the details, and admits his ignorance of the terms of the written agreement, which both parties agree was the final contract. The plaintiff himself states that the final conclusion of the parties was not reached until the night before the day of the execution of the agreement or upon that day, and what this witness states is entirely consistent with a want of knowledge of what then transpired. Even the defendant himself does not deny that

he was willing to loan the plaintiff money to buy the land, but it was to be a loan, upon the condition that the plaintiff would pay his own money, one-fourth or one-third of the purchase money.

Again, even if the defendant consented to loan the whole of the money, there was nothing to bind him, and a simple *consent* in conversation to loan does not constitute a loan in fact. There was a statement that he would loan unaccompanied by the fact of loan, and without any consideration passing. In addition to this, there is the admission of the plaintiff that the final agreement and understanding was as it is written.

The other material testimony in the cause bearing upon this question is that of the defendant. He denies any loan. As to the whole transaction he says: "Before the agreement was reduced to writing, Mr. Matthews wanted the land on better terms, but after the agreement was written, as that contained the only terms upon which I would buy the land, Mr. Matthews did not object." In view of this record can it be said that the consideration paid for this land is "clearly and fully established" to have been the money of the plaintiff? The equities alleged in the bill are really disproved by the very paper which the plaintiff stated, under his oath as a witness, constituted conclusive evidence of them. The material allegations of the bill are expressly denied by the answer. There is but one witness for the plaintiff who speaks to the loan. His own statements show that he was not acquainted with the entire transaction; that he was ignorant of, or had forgotten, the terms of the final written agreement, and in addition to all this, the deed between Byrne and Porter recites that the consideration was paid by Porter.

We cannot declare that a resulting trust is established by such testimony, or that the plaintiff was ever either a legal or equitable mortgagor. On the contrary, the written agree-

ment measured plaintiff's rights. Having failed to perform his covenants, he has no equitable right to the land, or to any part of the money for which it was sold. We think the decree of the Circuit Court dismissing the bill was correct, and, therefore, the decree is affirmed.

JOHN A. LORING, APPELLANT, VS. W. L. WITTICH, APPELLEE.

A Sheriff, who is a party defendant to a bill filed for the purpose of enjoining proceedings instituted to exempt personal property from levy and sale, and to subject such property to sale, and having no interest in the result, is not a necessary party to an appeal from a decree subjecting such property to levy and sale.

Appeal from the Circuit Court for Escambia county.

The appellee, Wittich, filed his bill alleging that he recovered a judgment against Loring, and had execution thereon in the hands of the sheriff, (Hutchinson); that the sheriff levied on the interest of Loring in a certain schooner; that Loring then made and delivered to the sheriff an affidavit in which he claims to be the head of a family and a resident and citizen of this State; and that an inventory contained therein was a true and perfect list of all his personal property, and claimed that the said property, including the schooner, was exempt, and should be exempted, from levy and sale, and released from levy under said execution. That the sheriff then appointed appraisers, who appraised the property at $480.12. Loring then demanded that the property be delivered to him as exempt from forced sale under the laws of this State.

The bill also alleges that the affidavit, a copy of which is annexed to the bill, "is insufficient to found a claim of exemption upon under the constitution and laws, and furnishes

no warrant to the sheriff for the appraisement, and will not justify him in releasing the vessel from said levy and delivering her to Loring."

The bill also charges as a matter of fact that Loring is not entitled to the exemption of the property, because he is not the head of a family, residing in this State, but that the said claim of exemption is false and fraudulent, and that the sheriff is about to deliver the said vessel into the possession of Loring, and that Loring is about to remove the same out of the State.

The bill then prays that the personal property mentioned in the said inventory be decreed to be subject to sale on the execution for the satisfaction of the judgment; that an injunction be granted restraining Loring "from further proceeding with the said claim of exemption and from receiving the said vessel from said Hutchinson," and restraining Hutchinson from further proceeding with the said claim of exemption or from delivering the vessel to Loring under said pretended claim.

The affidavit of Loring, annexed to the bill, states that Loring "is the head of a family and a resident and citizen of the State of Florida, and that the inventory following contains a true and perfect list of all his personal property, which he hereby points out and designates to the sheriff of said county, to-wit: [Then follows a list of the property, including an interest in the vessel.] All of which property he claims to be exempt from forced levy and sale under the constitution and laws of the State of Florida, and demands that when levied upon the same may be valued according to law." After the appraisal Loring demanded the release and return of the property, and at this stage the bill was filed.

Loring answered that he was entitled to the exemption of the property, and asserts that he is and has been a citizen of this State since the 18th day of May, 1876; that he at that time came to Pensacola, in said State, from the State of

Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since about the day aforesaid, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by returning to the State of Maine or removing elsewhere. He further denies that on the delivery to him of the vessel he will remove the same from this State. A preliminary injunction was granted, and upon a hearing on bill and answer a final decree was made, a motion by defandant to dismiss the bill for want of jurisdiction having been previously denied.

The court decreed that the personal property mentioned in the inventory was subject to sale under the executions in the hands of Hutchinson, the sheriff, toward the satisfaction of the judgment, and that Loring and Hutchinson be enjoined from further proceeding with or under the claim of said Loring, to exempt said property from levy and sale under said execution, and that said Loring pay the costs.

A motion to amend the answer by inserting after the words "head of a family" the words "residing in the State of Florida," on the ground that they had been omitted by inadvertence and mistake, was made after the announcement of the judge of his judgment and the decree, but before it was signed and recorded, but the judge denied the motion on the ground that the court had previously suggested that he would permit the amendment; but counsel did not then make the motion, as he insisted that the residence of the family was not necessary to the right to exemption, and that it was substantially set forth in the answer. Loring appealed without summoning Hutchinson or severing. The record does not show that Hutchinson refused to join in the appeal.

Wittich now moves to dismiss the appeal on the ground that the suit and decree were against Loring and Hutchin-

son, and the appeal is by Loring only, and it does not appear that Hutchinson has refused to appeal, and has been summoned, and that there has been a severance.

E. A. Perry, for the motion, contended that all parties to a decree must join in prosecuting an appeal, or if any refuse he must be summoned and severed, and cited 15 Fla., 596; 11 Wheat., 414; 7 Peters, 399; Minor, 27 and 275; 1 Porter, 277; 1 Stewart & Porter, 253; 1 Ala., 126; 2 Ala., 192; 8 John., 558, 565; 51 Ind., 539; Powell on Appellate Proceedings, 272-3-4, §23.

Geo. P. Raney, contra, admitted the general rule that all parties united in interest in a decree, or who are aggrieved thereby, should join, or that there should be summons and severance, but contended that the sheriff was an immaterial, improper, and unnecessary party; that he had no real interest in the matter, no joint interest with the appellant Loring, and was not a party aggrived; (13 Fla., 324; 13 Fla., 116; 1 Otto, 676,) and that not being a party in joint interest with Loring, nor a party aggrieved, he is not a proper party to the appeal, and Loring had the right to appeal alone. 41 Ind., 341; 23 Mich., 310; 7 Peters, 402.

The court denied the motion, the Chief-Justice stating orally the conclusion of the court, and citing 1 La. Ann.,204; 2d Id., 323; 5 Id., 668; 1 U. S. Dig., 1st series, 411. It was ordered accordingly.

JOHN A. LORING, APPELLANT, VS. W. L. WITTICH, APPELLEE.

1. The Constitution exempts a certain amount of personal property to "the head of a family residing in this State:" *Held,* That an averment that a party "is and has been a citizen of said State since May, 1876; that at that time he came to Pensacola in said State from Maine,

bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since that time, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by removing elsewhere;" is a sufficient statement that he is the head of a family residing in this State to entitle him to claim an exemption.

2. In claiming the exemption of personal property levied upon by the sheriff, the only fact necessary to be sworn to under Section 7, Chapter 1715, Laws of 1869, is that the inventory "contains a true and perfect list of all his personal property."

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

Geo. P. Raney for Appellant.

There are but two questions involved in this case to which the consideration of this court is invited:

1. Did the court err in making the decree of September 29th, 1877, and decreeing that the personal property therein referred to was subject to sale under the execution, and not exempt from sale under the exemption laws of Florida?

2. Did the court err in refusing the motion to amend the answer?

The point involved in the first question is, does the answer of the appellant state such facts as entitle the appellant to the benefit of the exemption laws of Florida? The cause having been heard upon bill and answer, all the material facts stated in the answer are admitted.

The language of the Constitution (Art. IX., Constitution of 1868) is: "A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property and the improve-

ments on the real estate, shall be exempt from forced sale under any process of law," &c.

The language of the answer asserts that appellant "is and has been a citizen of the said State (Florida) since or about the 18th day of May, 1876; that on or about the day above mentioned he came to Pensacola in said State from the State of Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since about the day aforesaid, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by returning to the State of Maine or removing elsewhere."

We respectfully submit that the language used in the answer shows an existence of the facts necessary to constitute a right of exemption, tested by the language and meaning of the Constitution. It shows that Florida is his permanent home, and that he is a citizen; that he came, bringing with him his family, with the intention of making it his permanent home; that he has no intention of changing such home or citizenship by removing to the State of Maine or elsewhere. It shows him to be the head of a family residing in this State.

The terms "resident" and "inhabitant" are not synonomous; the latter implies a more fixed and permanent abode than the former, and frequently imparts many privileges and duties to which a mere resident could not lay claim or be subject. (Farewell Co. vs. Devenport, 40 Ill., 197.) In 2d Gray it is said "residence" and "habitancy" are usually synonomous. A person may have two or more residences. Gilman vs. Gilman, 52 Maine, 165; College vs. Gore, 5 Pick., 370.

In McKenzie vs. Murphy, (24 Arkansas, 155,) it was held that the word "citizen," as used in the homestead law,

meant a resident of a county or town without any implication of political or civil privileges.

Residence should of course be actual, not constructive. Cary vs. Tice, 6 Cal., 625; Rix vs. McHenry, 7 Cal., 89.

A person who does not intend to reside permanently in the State can enjoy the benefits of the homestead law while he actually resides here upon his property, making it his home. Danley vs. Ayses, 23 Cal., 108.

The residence in Florida as to homestead and exemption cases is the same. The Constitution makes no distinction.

We contend that the answer shows an intent upon the part of the appellant to remain permanently in Florida; that his residence was actual, not constructive; that it also shows that his family were residing in Florida with him. It shows that they came here, and there is nothing showing that they have ever left, *"animo non revertendi."* The presumption is that they still remain here.

Not only does the answer show a residence, but it even shows Florida to be the domicile of the appellant. Smith & Armstead vs. Croom, *et als.*, 7 Fla., 81.

Domicile of the husband is the domicile of the wife. Davis vs. Davis, 30 Ill., 180.

E. A. Perry for Appellee.

The court did not err in its decree; the hearing upon bill and answer could not have resulted otherwise. The answer did not deny the material allegations of the bill. Even to construe it most favorably to the party who made it, rather than the reverse as required by the rule, it did not set forth such facts as entitled appellant to exemption, which is allowed only to the "head of a family residing in this State." Note the language and punctuation of Sec. 2, Art. IX., Constitution, page 22, which leaves no question but that the exemption is confined to families residing in this State.

The very issue presented by the bill was, that appellant was not "the head of a family residing in this State." How easy for him to have alleged that he was. And at the hearing, when complainant contended that to answer the bill and show that he was entitled to the exemption claimed, the appellant must set forth that the family of which he claimed to be heard resided in this State. And the court gave him an opportunity of doing so. He declined; and then, after decree against him, claimed the right to so amend his answer, upon the ground that the proper allegation was lacking through "inadvertence and mistake." That has very much the appearance of trifling with a court, and for this court to give him the relief he seeks by his appeal would seem to be offering a premium for such trifling.

That no one but the head of a family residing in this State is entitled to exemption is manifest, not only from the language of the Constitution, but also from the well recognized purpose of the homestead provision, *i. e.*, to prevent families in the State from being forced to absolute want and privation, and becoming a burden upon the State, the counties, or the towns. While that purpose should be kept in view and to that end, the homestead laws should be construed somewhat liberally. Yet it should be kept in mind that creditors have rights which prevent these laws from being extended by construction. Ward vs. Hughes, 16 Min., 159.

The appellant argued in the court below that where the husband lives, there is the domicile and residence of the wife. This fiction does not obtain in applying the homestead laws. The phrase "residing in this State" means an actual, not a constructive residence. Rix vs McHenry and Wife, 7 Cal., 89; ib., 245.

If residence of family were not necessary, there would be no end to the fraud and injustice that would result. Cary vs. Tice, 6 Cal., 625.

This State might, at the expense of creditors, be supporting families in Georgia, Maine, and the whole world. It is enough to apply money, which rightfully belongs to others, to the support of the families which reside in her own borders.

How absurd for the court below to have allowed an amendment after decree which would have rendered the decree ridiculous.

Even though his honor could have been made to believe that the appellant, through "inadvertence and mistake," took up half a page of his answer to avoid the use of twelve words which would have done away with any hearing upon bill and answer. If in point of fact appellant had been the head of a family residing in this State, and after decree had any remedy for the results of his obstinate refusal to act upon the Chancellor's suggestion, it must have been reached by some other method; for instance, by petition to set aside decree and for rehearing, certainly not by motion to so amend his answer as to make decree erroneous.

THE CHIEF-JUSTICE delivered the opinion of the court.

The appellee filed his bill alleging that he recovered a judgment against Loring, and had execution thereon in the hands of the sheriff, (Hutchinson); that the sheriff levied on the interest of Loring in a certain schooner; that Loring then made and delivered to the sheriff an affidavit in which he claimed to be the head of a family and a resident and citizen of this State; and that an inventory contained therein was a true and perfect list of all his personal property, and claimed that the said property, including the schooner, was exempt, and should be exempted, from levy and sale, and released from levy under said execution; that the sheriff then appointed appraisers, who appraised

the property at $480.12. Loring then demanded that the property be delivered to him as exempt from forced sale under the laws of this State.

Complainant alleges that the affidavit, a copy of which is annexed to the bill, "is insufficient to found a claim of exemption upon under the constitution and laws, and furnishes no warrant to the sheriff for the appraisement, and will not justify him in releasing the vessel from said levy and delivering her to Loring."

The bill charges as a matter of fact that Loring is not entitled to the exemption of the property, because he is not the head of a family residing in this State, but that the said claim of exemption is false and fraudulent, and that the sheriff is about to deliver the said vessel into the possession of Loring, and that Loring is about to remove the same out of the State.

The bill then prays that the personal property mentioned in the said inventory be decreed to be subject to sale on the execution for the satisfaction of the judgment; that an injunction be granted restraining Loring "from further proceeding with the said claim of exemption and from receiving the said vessel from said Hutchinson," and restraining Hutchinson from further proceeding with the said claim of exemption or from delivering the vessel to Loring under said pretended claim.

The affidavit of Loring, annexed to the bill, states that Loring "is the head of a family and a resident and citizen of the State of Florida, and that the inventory following contains a true and perfect list of all his personal property, which he hereby points out and designates to the sheriff of said county, to-wit: [Then follows a list of the property, including an interest in the vessel.] All of which property he claims to be exempt from forced levy and sale under the constitution and laws of the State of Florida, and demands that when levied upon the same may be valued according to

law." Signed and sworn to by John A. Loring. After the appraisal Loring demanded the release and return of the property, and at this stage the bill was filed.

Loring answered that he was entitled to the exemption of the property, and asserts that he is and has been a citizen of this State since the 18th day of May, 1876; that he at that time "came to Pensacola, in said State, from the State of Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since about the day aforesaid, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by returning to the State of Maine or removing elsewhere." He further denies that on the delivery to him of the vessel he will remove the same from this State. A preliminary injunction was granted, and upon a hearing on bill and answer a final decree was made, a motion by defendants to dismiss the bill for want of jurisdiction having been previously denied.

The court decreed that the personal property mentioned in the inventory was subject to sale under the execution in the hands of Hutchinson, the sheriff, toward the satisfaction of the judgment, and that Loring and Hutchinson be enjoined from further proceeding with or under the claim of said Loring, to exempt said property from levy and sale under said execution, and that said Loring pay the costs.

A motion to amend the answer by inserting after the words "head of a family" the words "residing in the State of Florida," on the ground that they had been omitted by inadvertence and mistake, was made after the announcement by the judge of his judgment and the decree, but before it was signed and recorded, but the judge denied the motion on the ground that the court had previously suggested that he would permit the amendment; but counsel did not then make the motion, as he insisted that the residence of the

family was not necessary to the right to exemption, and that it was substantially set forth in the answer.

As to this motion it is difficult to say that it should have been granted at any stage, because the words "head of a family" do not occur in any part of the answer, and we can perceive no effect to be given to the answer or to the words by inserting them.

The law relating to the method of designating personal property is found in sections 7 and 8 of "an act providing for setting apart a homestead and personal property to be exempted from forced sale under process of law," approved June 23, 1869. Section 7 provides that when a levy shall be made upon personal property which may be exempt from levy and sale, the officer shall, if desired by the debtor, his agent or attorney, make an inventory of the whole of the personal property of the party against whom such process issued; and the party shall point out the whole of his personal property to the officer, and make affidavit that the inventory contains a true and perfect list of all his personal property. It is then the duty of the officer to summon appraisers and have them appraise the property on their oaths at its cash value, and sign the appraisement, with the officer, after notice to the judgment creditor. Section 8 authorizes the person entitled to such exemption, his agent or attorney, to select from such inventory, when exempted, an amount of such property not exceeding the amount or value exempted.

On the appraisement being signed by the appraiser, the debtor demanded it from the sheriff as exempt from sale. It is claimed by the complainant that the affidavit is insufficient to found a claim of exemption, and furnishes no warrant for the appraisement and the delivery of the property to Loring. It will be observed on reading the statute that when personal property levied on is claimed to be exempt from sale, the only oath required of the claimant is that the

inventory "contains a true and perfect list of all his personal property." The law points out no form of proceeding by which the claimant shall prove to the satisfaction of the sheriff that he is *entitled* to claim an exemption. If he makes the affidavit and asserts on oath or otherwise to the sheriff that he is entitled to the exemption of the property designated, the sheriff must satisfy himself as best he may, and take such precautions as he would under other circumstances to protect himself. He is invested with no judicial power to decide upon any evidence of the right to claim exemption. Having levied upon the property, he is probably liable to the creditor if he releases it to a party not entitled to it. If he refuses to release it, the claimant may, by replevin, try the title and the right of exemption. Or, perhaps, the sheriff may protect himself by summoning an inquest. 1 Tidd's Pr., 922, 928; 8 Johns., 188; 4 T. R., 633; 6 T. R., 88. But as counsel have not considered this point we will not pursue it.

The omission of the party claiming the exemption to swear that he is "the head of a family residing in this State," in the affidavit annexed to the inventory, does not preclude him from claiming and proving that he is entitled to have the property exempted from sale.

The point of the argument is whether the defendant, by his answer, sets out facts which show that he is a person entitled to claim this exemption. The bill alleges that his claim is false and fraudulent because the defendant, Loring, is not, in fact, the head of a family residing in this State, and complainant insists that the answer does not deny this allegation, and does not show that he is. It is therefore necessary to examine the answer and ascertain whether it is sufficient in this respect.

The constitution declares that a homestead (of a certain extent) "owned by the head of a family residing in this State, together with one thousand dollar's worth of personal

property, and improvements on the real estate, shall be exempted from forced sale under any process of law, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists."

The answer asserts that Loring is and has been a citizen of this State since about the 18th of May, 1876, at which time he came to Pensacola, in this State, from Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since that time, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by returning to the State of Maine or removing elsewhere.

The constitution does not require that a person claiming exemption shall be a married man, but he must be the head of a family. How large his "family" must be is not prescribed, but he must be the head of a family. When he asserts, therefore, that he came to this State over a year before, bringing with him his family, with the intention of making this his permanent home, and that this State has, ever since he came into it, been his home and with no intention of removing elsewhere, he alleges facts which show *prima facia* that he is the head of a family residing in this State, and unless it is shown that some of these material facts are not true, the case required by the constitution to be made out by him is substantially shown. That he came with his family and established his home at the city of Pensacola with intent to make it his permanent home, and has made it his permanent home ever since he came to it, implies and asserts that he is the head of his family; that his residence and that of his family are in this State, and that they remain here, or at least that their residence is still here. If they are absent from the State temporarily or otherwise, that fact does not appear in the pleadings.

If these allegations of the answer are true, the domicil

of the defendant is in Florida, and the laws of Florida will control the descent of all the property he owns here. "The determination of that locality," says the court in Smith and Armistead vs. Croom, 7 Fla., 152, 153, "is the subject of evidence, and that evidence must establish two points—first, an actual residence, and, secondly, the deliberate intention to make it his home, in the acceptation in which it is used in the foregoing citations."

The allegation that he came "bringing with him his family" and established a residence here, is an assertion that he controls the family as its head. No other inference can be legitimately drawn from the allegation as it stands. Were the allegation as full and explicit as the complainant insists it should be, and the proof should be no more than the statements contained in this answer, it would be very difficult to say that the answer was not *prima facia* proved to be true.

According to the answer, the defendant established his residence here with his family, whom he brought for the purpose of residing here. The cases in California referred to by counsel for appellee, (Rix vs. McHenry and wife, 7 Cal., 89, and Cary vs. Tice, 6 Cal., 625,) relate to mortgages given by a husband before the wife or family occupied the land mortgaged, and before the wife came into the State. It was held that there was no actual residence of the family upon the land, and it was, therefore, not stamped with the character of a homestead. Had the proof been, as in the answer here, that the man and his family were in possession, we think the court in California would not have been put to the trouble of deciding the case.

We shall not undertake to decide what may constitute the "family" of a person to enable him to claim the benefit of the exemption laws, nor whether the appropriate remedy has been sought in this case by bill in equity—the subject

of it being personal property—as the latter question has not been considered or presented by counsel.

The decree that the property described in the bill should be subjected to sale on execution, and that the defendant be enjoined from claiming an exemption thereof and for costs, is reversed, and this cause is remanded with directions that such other proceedings may be had, according to the practice of the court as the court may be advised is proper.

BENJAMIN CHANDLER AND W. L. WITTICH, APPELLANTS, VS. GEORGE W. WRIGHT, APPELLEE.

1. Pending the consummation of a sale of land an injunction restraining it was served on the parties, at the suit of a third person; afterwards, by an arrangement by stipulation of the parties, including the plaintiff in the injunction suit, a conveyance of the land was made and the consideration secured by notes and mortgage payable at a day certain, one note without interest and others with interest, which notes and mortgage were deposited with a party in trust, subject to the determination and decree of the court in the injunction suit; *Held*, That the injunction was waived and did not attach to the notes and mortgage, and did not relieve the maker of the notes from the payment of interest thereon after maturity, and he was not restrained by the injunction, or by the arrangement, from paying or tendering the money to the holder when due, according to the legal effect of his promise.
2. A tender of a sum less than the amount due upon the note is of no avail.

Appeal from the Circuit Court for Escambia county.

The court adopt the statement of facts contained in the briefs of counsel.

W. A. Blount for Appellants.

The bill is an ordinary bill for foreclosure of a mortgage, setting up the execution of three notes on April 19, 1875,

by appellee to appellants, one for $3,000, payable one day after date without interest, one for $2,000, payable January 1, 1876, with interest from date, and the third for $5,000, payable June 1, 1876, with interest from date. The bill alleges non-payment of the notes, and asks for a decree for the principal of the three, with interest from maturity of the first, and from date of the second and third up to date of decree, less certain payment, which bill admits.

The answer admits indebtedness for face of the notes and interest on the two last to their maturity, less the payment mentioned, but denies the appellee's liability for any interest on the first note, and for any interest on the two last after their maturity. To avoid the liability for this interest, it recites that the consummation of the bargain for the sale of the mortgaged premises by appellants to appellee was prevented by a restraining order in a suit of Geo. W. Sherman vs. Benj. Chandler; that to avoid the effects of said restraining order an agreement was entered into, by which the notes given by appellee were to be deposited in trust with one Thos. W. Hutchinson, as security to Geo. W. Sherman for the payment of such decree as might be rendered in his favor against Chandler, said notes to be held subject to the final decree of the court; that appellee gave the three notes, the first of which represented what was to have been a cash transaction under the original agreement, and for which appellee was ready to pay cash, and they were deposited with Hutchinson in pursuance of the agreement; that the maturity of each of said notes occurred while the agreement was still in existence and before the settlement of the suit; that appellee at all times kept the money for, and was prepared to pay the first note; that at the maturity of the second note he laid aside the money to pay it, and that at the maturity of the third note he offered to pay all of them, with interest to maturity of each, but that Hutchinson refused to receive the money—first, because appellee asked for

a credit of $400, which he had, as a matter of accommodation to Chandler, paid to him on account of said notes after the same had been deposited with Hutchinson; second, because appellee refused to pay interest on the $3,000, or on the $2,000, after maturity—that the suit was settled in May, 1877, and appellee tendered the whole amounts due on said notes at maturity, less the $400 which he had advanced to Chandler.

The cause was heard upon bill and answer, and a decree rendered against appellee for the face of said notes and interest thereon till maturity. From this decree appellants appeal, alleging error therein because interest was not also allowed on the said notes from maturity until decree.

From the facts set up in the answer, appellee must show that—first, Hutchinson had no right to receive the money, or would not have received it; second, or that appellee has tendered it in such manner as to discharge him from liability for interest.

First. It is clear that if Hutchinson had the right to receive the money, it was Wright's duty to pay it to him at maturity. Hutchinson was trustee of the notes, as evidences of debt, payable in the future, and not as intrinsically valuable pieces of paper. He was trustee for both parties to the agreement. He was an equitable assignee with Wright's knowledge, and as such entitled to collect the notes. The case is not similar to that of money garnisheed in the hands of a debtor, to which appellee's attorney analogises it, because in that instance the debtor can pay neither plaintiff nor defendant, but in this case there is a trustee intervening between plaintiff and defendant, created for the purpose of protection to the rights of both. Appellee in fact, before the expiration of the agreement, acknowledged Hutchinson's power to receive by an alleged tender, which it is true was refused by Hutchinson, but not on the ground of want of

power. He would have received the payment but for deficiencies in the tender.

Second. If Hutchinson could receive the money, and it has not been paid, then nothing but a valid tender can avoid interest thereon. As to the $3,000 note, when it fell due it was in the hands of Hutchinson, as trustee for both Chandler and Sherman, and even if it was to have been a cash transaction between Chandler and appellee,yet when it was put into the form of a note and fell due, Sherman also had an interest in the funds and a right to demand its payment to his trustee. There was no payment, or offer of payment. The $2,000 was not tendered at maturity, nor until the maturity of the $5,000 note, five months after, when he tendered all the money together. This tender admits Hutchinson's power to receive the money, but Wright would not pay interest on the $2,000 and $3,000,and demanded $400 credit for money advanced to Chandler after the deposit with Hutchinson, to which demand Hutchinson, in his capacity of trustee for Sherman, could not of course accede. These restrictions, of course, invalidated the tender, (2 Parson's on Contracts, 640 to 646,) for the rule is as strict in equity as in law. 5 Monroe, 36. The same restrictions invalidate the last tender.

R. L. Campbell for Appellee.

This is a suit for the foreclosure of a mortgage of which appellants are mortgagees and respondent mortgagor. The mortgage debt, so far as embraced in the bill, consists of three notes; one for $3000, without interest, payable at one day, and the other two with interest until maturity—one for $2000, payable 1st of January, and the other for $5000, payable 1st of June, 1876.

The answer admits the notes and mortgage, subject to the credit stated in the bill, and offers to bring into court what

it admits to be due, but objects to paying any interests on the first note, and on the others after maturity. The notes with others were given for the mortgage premises. Before the bargain was consummated it was enjoined at the instance of one Sherman, and in order to prevent a defeat of the sale, appellants, or rather Chandler, with the consent of Wittich, entered into an agreement that one Hutchinson should hold the three notes and mortgage in trust, subject to any decree which Sherman might obtain.

The $3000 note represents what was to have been a cash payment, and was given solely for the purpose of enabling Chandler to carry out the agreement for discharging the restraining order. Respondent had the money when the note was given, and was ready and anxious to pay it over instead of giving the note; and he afterwards kept it apart from his other funds, and unemployed in his business, or otherwise. As the other notes matured, money was provided and set apart to pay them, principal and interest, and on the 1st of June, 1876, a tender of the amount of the first note, and of the other two, with interest to maturity, less $400 which had been paid to Chandler, was made to and refused by Hutchinson. The money so provided, remained set apart unemployed and unmixed with respondent's funds, until the decision of the Sherman case in May, 1877, when it was again tendered and refused, except as to enough to satisfy the decree.

The Circuit Court refused to charge respondent with interest on the $3000 note, and on the others after maturity. On that basis a decree was rendered for complainants and satisfied by respondent.

The case having been heard on bill and answer, all the statements of the answer, whether responsive to bill or not, were assumed to be true. 1 Daniell's Ch. Pr., 845, note.

The agreement to deposit the notes and mortgages with Hutchinson accomplished the purpose of the restraining

order, and his trust was restricted to holding them to meet the decree in the Sherman case.

As to the first note there was no contract to pay interest, and interest is never allowed as damages where the maker is restrained by authority of law from paying. Swamscot Machine Co. vs. Partridge, 5 Foster, 628; Irwin vs. Pittsburg, &c., R. R. Co., 43 Penn. St., 488; Adams vs. Cordis, 8 Pick., 260; Prescott vs. Parker, 4 Mass., 170.

Besides, the note was given for the accommodation of appellants, and the money which respondent was prepared to pay in lieu of giving the note, he was compelled to keep unemployed, set apart, and ready to pay over when called upon.

On the other two notes respondent contracted to pay interest up to maturity, and *that* interest he was always willing and offered to pay, and has paid.

A debtor who is prevented by injunction or other judicial process from paying his creditor at maturity is not responsible for interest. Willing vs. Consequa, Peters C. C., 301; Fitzgerald vs. Caldwell, 2 Dallas, 215; Mattingly vs. Boyd, 20 How. S. C., 128; Little vs. Owen, 32 Ga., 20.

The exceptions to the rule are as follows: The use or employment of the money by the debtor. Adams vs. Cordis. Where he has been guilty of fraud or collusion. Mackey vs. Hodgson, 9 Penn. St., 468; Rushton vs. Rowe, 64 ib., 63. Where the facts raise the presumption of his inability or want of readiness to pay. Norris vs. Hall, 18 Maine, 332. Mingling the money with his own, and treating it as such. Woodruff vs. Bacon, 35 Conn., 97. Where he assumes character of litigant. Chace vs. Manhardt, 1 Bland, 33; Moore vs. Lowrey, 25 Iowa, 336. Where he garnishees himself. Willing vs. Consequa, *supra*. Where he is guilty of "negligence and misconduct." Tazewell's Ex. vs. Barrett & Co., 4 Hen. & Munf., 259. Where he loans out the money.

Mattingly vs. Boyd, *supra*. A party *contesting* must pay money into court. Curd vs. Letcher, 3 J. J. Mar., 443.

Respondent's case falls within none of the exceptions.

He could not pay the money into court, for, after the agreement, he was not a party to any proceeding before the court.

He attempted to pay the money to Hutchinson, but he refused to receive it because interest on the first note and interest on the second note, after maturity, was not embraced in the tender.

Although Hutchinson was not under the terms of his trust authorized to receive it, the tender shows respondent's anxiety to be rid of the money.

The second tender, which was made on the decision of the Sherman case, was also refused, beyond what was requisite to meet the decree, for the like reason that the first tender had been rejected.

THE CHIEF JUSTICE delivered the opinion of the court.

It is true that while a debtor is prevented by an injunction or other order of a court from paying his debt at maturity, he is not liable for interest thereon, because he lawfully withholds the money. But is this a case in which the debtor has been so prevented? An injunction was issued which restrained the conveyance of certain real estate to the defendant. The effect of the injunction was obviated by the parties by an agreement, whereby the conveyance was consented to upon condition that certain notes, secured by mortgage on the property, (given for the purchase price thereof,) should be deposited with one Hutchinson as trustee, to be held by him subject to the determination of the suit in which the injunction was issued. One of these notes was payable one day after date, without mentioning interest, and the two other notes were payable at a future day with inter-

est. While the notes and mortgage were thus put in the place of the property for which they were given, the injunction did not, of course, restrain the payment of the money to the trustee when it became due, nor does it appear that the trustee was prevented from receiving it,or from taking measures to collect it.

The defendant was ready to pay each of the notes at maturity, and held the money apart from his other money, and from other employment. When the note first due matured, the money was not tendered; when the next note fell due no tender was made, and when the third note matured the defendant offered to pay the trustee the principal of all the notes, with interest up to maturity, less four hundred dollars which he had advanced to Chandler on account of the notes while they were in the hands of the trustee; but the trustee refused to receive it in discharge of the notes, because it did not cover the whole amount of principal and interest to the time of the offer. When the suit in which the injunction had issued was settled, the defendant renewed the offer to the trustee, who again refused to receive the money, for the reason that defendant declined to pay interest beyond the maturity of the notes.

We find no unconditional tender by the defendant of the principal of the notes or either of them,nor even notice to the trustee or to the parties that the money was set apart and held in readiness to pay the notes, or either of them. So far as the injunction is concerned, its force was spent when all the parties to it by contract put in its place another security. It is not apparent that a payment of the money to the mortgagee, and the surrender by the trustee of the notes and mortgage, however it might have put the plaintiff in the injunction suit to inconvenience, would have been in anywise a violation of the injunction. The trustee and the parties to the transaction may have become liable to certain proceedings for a violation of the contract of trust and confi-

dence, but how would they have been guilty of a contempt of the injunction? The thing enjoined had been expressly waived, and new security had been given by contract for a non-performance of which a new remedy must have been pursued. Howard vs. Durand, 36 Ga., 346. The notes were given by the defendant here for the purpose of securing the purchase money of the land purchased, and for the purpose of deposit with the trustee as security to the complainant in the injunction suit, and to be subject to the order of the court in that suit upon rendition of a final decree therein. The notes were voluntary agreements to pay money at specified times. When the note payable one day after date became due, it was chargeable with interest by law, and the law was part of the contract. There was interest to be paid on the other notes from their date by their expressed terms, and after they became due they bore interest according to law. Had it had been the intention of the parties that these notes should not draw interest, as is claimed, after they should become due and during the pendency of the injunction suit, we must presume that intention would have found expression in some manner; but instead of this the contract was that interest should be paid until the notes were satisfied. The deposit of the notes with a trustee did not change their legal effect. The trustee was the trustee of the plaintiffs in this and the other suit and not of this defendant, and a payment or tender to the trustee would have worked a discharge of the defendant as effectually as if the notes had been in the hands of the payees and the payment or tender made to them. The upshot of the whole matter is that the defendant agreed to pay principal and interest, without reference to the character of the holder; that he has not been restrained by any legal process or order from so doing, nor from tendering the money if he saw fit to do so, and that he has neither paid nor tendered as he agreed to do, though the depositary of the notes was ready

to receive payment of them as they became due. That he was ready to pay is not what he engaged; he agreed to pay, and failing to do so he is liable to all the consequences of the failure.

The decree of the Circuit Court is reversed in so far as it denies, or fails to allow, the computation of interest on the notes from their maturity to the time of payment or tender of the amount due thereon according to their import, and a further decree will be made by the Circuit Court in accordance with this order and the opinion of this court in the premises.

WILLIAM H. GIBSON, APPELLANT, VS. WILLIAM MITCHELL, ET ALS., APPELLEES.

1. A suit by a co-surety against the heirs of a deceased co-surety for contribution is not barred by the statute of non-claim, the administrator having published the notice required by that statute and been discharged and the estate distributed before the cause of action accrued as between the sureties upon their bond.
2. The presentation of such claim to the discharged administrator is of no effect.
3. After the discharge of an administrator by due course of law and the distribution of the estate to the heirs, a suit in equity for contribution may be maintained against the heirs by a co-surety of the decedent, whose claim arose after the discharge, to the extent of the property or its value which came to the heirs.
4. Such suit is not a suit against heirs upon the bond of the ancestor to recover a personal judgment against them, but is in the nature of a suit *in rem* to reach the property of the ancestor. The decision in this case does not conflict with Gilchrist vs. Filyau, 2 Fla. R., 94.

Appeal from the Circuit Court for Gadsden county.

The appellant, William H. Gibson, filed his bill in equity against the appellees, William Mitchell and Sarah V., his

wife, Thomas Mitchell and Frances C., his wife, William A. Scott, a minor, and Thomas Mitchell as guardian for said minor, Sarah J. Hutchinson, *feme sole,* and Benjamin F. Watson. The bill alleges that on the ninth day of February, A. D. 1857, the said Gibson, together with one Thomas Scott, since deceased, became the securities of the said Benjamin F. Watson upon his bond as guardian of one James M. Gilchrist, a minor, and said Watson was thereupon appointed and duly qualified as such guardian by a court of competent jurisdiction, and took upon himself the guardianship of the person and property of said minor.

That on the day of , A. D. 1862, the said Thomas Scott, complainant's co-surety, father of the defendants Sarah V. and Frances C. Mitchell, and William A. Scott, minor, and then husband of Sarah J., now Sarah J. Hutchinson, departed this life intestate, leaving a considerable estate consisting of real and personal property; that said estate was administered upon by one P. A. McGriff, who, after having received a final discharge by the court appointing him as said administrator from the further administration of the same, turned over the residue of said estate to the legal heirs and distributees of the estate of the said Thomas Scott, deceased; that some time in the year 1872, and soon after the said James M. Gilchrist had arrived at the age of twenty-one years, complainant (appellant) was notified by the said James M. Gilchrist that upon a final settlement between him and his guardian, the said Watson, the latter was largely indebted to him, and totally unable to pay, and that unless complainant (appellant) arranged to pay, and did pay to him the amount found to be due him by the said Watson upon final settlement between them, that an action at law would at once be instituted against complainant as surviving security upon the guardian bond above referred to.

That upon ascertaining with certainty that the said Wat-

son would be indebted to his former ward upon final settlement of accounts in the sum of twelve hundred dollars and more, and the said James M. Gilchrist proposing to complainant (appellant) to take eight hundred dollars as a compromise and full settlement of his demands against his former guardian, the said Watson, complainant, after having obtained legal advice upon the subject, and being advised that in the event of a suit at law against him upon said bond a recovery for the whole amount would be obtained against him, (the said Benjamin F. Watson being being wholly insolvent) proposed to the above named heirs at law and distributees of the estate of the said Thomas Scott, deceased, complainant's co-security, who were, and still are, in the possession of the estate of said deceased, turned over to them by the said P. A. McGriff as administrator as aforesaid, to make contribution or to join him in raising the sum of eight hundred dollars to pay the said James M. Gilchrist as a compromise and final settlement of his claim against the said Watson as guardian aforesaid, for which sum the estate of complainant, as well as the estate of the said Thomas Scott, deceased, would be eventually liable; that the said heirs and distributees of the said Thomas Scott, deceased, declined, and still decline, to accede to this reasonable and just proposition, or contribute any part or portion of said demand.

That believing the proposition of the said Gilchrist moderate and reasonable, complainant, to avoid expense and litigation, on the day of , A. D. 1872, paid said Gilchrist the sum of eight hundred dollars in full payment and satisfaction of his demand against the said Watson on his said guardian's bond, and defendants refuse to contribute the sum of four hundred dollars, with the legal interest due thereon from the date of payment by complainant to the said Gilchrist.

The bill then alleges that the said Thomas Scott died

seized of certain real estate therein particularly described, which is now in possession of defendants (except Watson) as heirs and distributees of the said Thomas Scott; and prays that said estate be decreed to contribute the amount found to be due complainant on account of the payment by him above mentioned.

The answer admits the execution of the bond as alleged in the bill, and that Thomas H. Scott died intestate at the time stated, leaving both real and personal property. It then alleges that afterwards, to wit: on the 1st day of January, A. D. 1863, letters of administration upon the estate of the said Thomas H. Scott, deceased, were in due form of law granted by the probate court, in and for Gadsden county, to one Patrick A. McGriff, and he did, in accordance with the requisition of the statute in such case made and provided, entitled "an act concerning wills, letters testamentary, letters of administration, and the duties of exectors, administrators," &c., by advertisement dated the day of , A. D. 1863, and published once a week for the space of four weeks in a newspaper printed in the county of Gadsden, and State of Florida, give notice to all creditors, legatees, and persons entitled to distribution of the estate of the said Thomas H. Scott, deceased, that their claims and demands would be barred at the expiration of two years from the publication of said advertisement, unless the same were exhibited to the administrator of the said Thomas H. Scott, deceased, within that time; and that the said bond was never presented or exhibited to the said Patrick A. McGriff as administrator as aforesaid by the complainant or any one else within two years from the publication of said advertisement as aforesaid; and that the said Patrick A. McGriff as administrator as aforesaid has fully paid and discharged all the claims and demands against the said Thomas H. Scott which were presented to him within the time aforesaid, and has distributed the remainder

of said estate among these defendants, and afterwards, to wit: on the 10th day of October, A. D. 1870, was in due form of law discharged by the said probate court in and for Gadsden county from the further administration of said estate.

A general replication to the answer was filed by complainant, but was afterwards withdrawn by consent of counsel, and the case heard upon bill and answer.

After argument a decree was entered dismissing the bill. From this decree complainant appealed.

H. F. Sharon for Appellant.

If several persons are bound by a common charge, the liability being joint, and one pay more than his share, he is entitled to contribution from the rest. Adam's Equity, top page 495, and note.

The doctrine of contribution is not so much founded on contract as on the principle of equity and justice. Ib.; Campbell vs. Massier, 4 Johns. C. R., 334; S. C. Johns. C. R., 21.

The surety who has paid the whole is entitled to receive contribution from all the others for what he has done in relieving them from a common burden. Story's Eq. Jur., Sec. 492, and note; Spencer vs. Parry, 3 Adolph. & Ed., 331; Brown vs. Lee, 6 Barn. & Cress., 698; Kemp vs. Finden, 12 Mees. & Welsb., 421; Amer. Chan. Digest, vol. 1, pp. 373-4-5.

Where the ancestor binds himself and his heirs in an obligation, the obligee may sue his heirs, but the heirs are not bound further than the assets descended to them. Bacon's Abr., vol. 4, pp. 616, 617, 625, and notes; Amer. Chan. Digest, p. 295, §§39 and 45, p. 297, §55; Cogswell vs. Lyon, 3 J. J. Marshall, 39; Leach vs. Gentry, 1 J. J. Marshall, 349; Buford vs. Pawlings' Exrs., 5 Dana, 289.

The heirs should be made parties. Story's Eq. Pleading, Secs. 163, 173, 180, and notes; Knight vs. Knight, 3 P. Will., 333; Gawler vs. Wade, 1 P. Will., 99.

The statute of "non-claim" does not apply in this case.

Where cause of action did not accrue until after the limitation expired, held not within the statute. Miller vs. Woodward, 8 Missouri, 176; May vs. Vann, 15 Fla., 553.

R. B. Hilton, on same side, cited the following cases and authorities:

May vs. Vann, 15 Fla., 553; Story Eq. Jur., §§492, 497; Dearing vs. Winchelsea, 1 White and T. L. E. Cases, 96, Am. Ed.; McKenna vs. George, 2 Rich. Eq., 15; Preston vs. Preston, 4 Grat., 89, 90; 10 N. H., 489; 11 ib., 431; 1 Parsons on Contracts, 35, 36, 5th Ed.; 1 Robinson Practice, 442; 2 ib., 439, 440, 441; 1 Greenleaf (Maine), 195; 4 Gray, 437; 15 Ill., 159; 1 Met., 389; 12 ib., 480.

Though the statute of limitations should be a bar to an action by the obligee against the *heirs* and representatives of the principal, yet that will not prevent a surety from maintaining an action against a co-surety for contribution. For the right to such action grows out of the original implied agreement arising out of their being co-sureties, &c., &c. 1 Rob. Prac., 492.

And says Prof. Parsons: "The contract on which the assumpsit is founded" (in action for contribution which may be maintained even at law)"dates from the time when the relation of co-surety and obligor is entered into, although the cause of action does not arise until the payment. Hence the discharge of one of the joint debtors by whatever cause, from his direct liability to the creditor, does not relieve him in law any more than in equity from his obligation to indemnify such of the remaining joint obligors as have borne

more than their original proportion of the debt. 1 Par. on Cont., 35, 36, 5th Ed.

John W. Malone for Appellees.

The record in this case raises the following questions:

1. Can the liability of Thomas H. Scott to William H. Gibson, for contribution, be enforced in a court of equity against the heirs of the said Thomas H. Scott to the extent of the property received by them as their distributive shares from the administrator of the said Thomas H. Scott at the suit of the said William H. Gibson?

2. Is the claim or demand of the said appellant, for contribution, barred by the statute of non-claim?

Under the statute law of Florida sureties are bound to each other for a proportionable contribution of the amount of the instrument upon which they are sureties, and if any of them be compelled to pay any part of said instrument, he shall have his remedy by suit against his co-surety. Thomp. Dig., 348-9.

Upon the payment by Wm. H. Gibson of the indebtedness of Benj. F. Watson to Jas. M. Gilchrist, the relation of creditor and debtor was created between Wm. H. Gibson and Thos. H. Scott, and this statute gave to Wm. H. Gibson an immediate right of action against Thos. H. Scott for contribution; and the right of action having accrued after the death of Thos. H. Scott, survived against his personal representatives.

A right of action, which does not die with the person, survives against the personal representative and not against the heirs of a deceased person. Williams on Executors, 1464, *et seq.;* Toller on Executors, 459, *et seq.*

Wm. H. Gibson would have encountered no legal obstacle in enforcing his right of action for contribution if Thos. H. Scott had been in life when it accrued; nor would he have

encountered any if the administrator of Thos. H. Scott had not been discharged when it accrued, for in the one case he could have enforced it against Thos. H. Scott himself, and in the other against the administrator.

If the administrator of Thos. H. Scott had never been discharged, Wm. H. Gibson would have his right of action against the administrator and not against the heirs of Thos. H. Scott, although the administrator may have distributed all of the property of the intestate among the said heirs. Nor would the said heirs be necessary or proper parties to any action which Wm. H. Gibson might bring against the administrator to enforce his right of contribution. Telfair's Extrs vs. Stead's Extrs, 2 Cranch, 407.

If Wm. H. Gibson cannot have the right of action for contribution against the said heirs during the continuance of the administrator in office, he certainly cannot have it against them after the discharge of the administrator from office. 13 Mass., 390; 14 N. H., 272.

In the State of Florida the heir is not liable upon the bond of the ancestor, although expressly named therein. 2 Fla., 94.

Immediately upon the payment of the indebtedness of Benj. F. Watson to Jas. M. Gilchrist, a claim or demand accrued in favor of Wm. H. Gibson against Thos. H. Scott for contribution, and the statutes of limitation and non-claim commenced to run upon said claim or demand. May vs. Vann, 15 Fla., 557.

If Thos. H. Scott had continued in life, he could have availed himself of the statute of limitations as a defence if Wm. H. Gibson had failed to enforce his claim or demand within the time limited by said statute; and in like manner, after the death of Thos. H. Scott, his personal representative could have availed himself of either the statute of limitations or statute of non-claim if Wm. H. Gibson had failed to enforce or present his claim or demand within the

time limited by these respective statutes. And we contend that the heirs of Thos. H. Scott, after the full administration and distribution of his estate, and the discharge of his administrator, are entitled to the same benefit from these statutes as defences to this suit.

The statute of non-claim commenced to run against Wm. H. Gibson's claim or demand for contribution on the —— day of ———, A. D. 1872, the day on which Wm. H. Gibson paid Benj. F. Watson's indebtedness to James M. Gilchrist, and in two years from that date worked a complete bar to said claim or demand, because Wm. H. Gibson failed to present the same within the said two years. But it may be urged that there was no administrator to whom Wm. H. Gibson could present his claim during that time, and therefore the statute of non-claim could not run against it. In answer to this we say that it should have been presented to the discharged administrator of Thos. H. Scott.

Suppose that during and after the administration and distribution of Thos. H. Scott's estate, and the discharge of his administrator, Wm. H. Gibson had been under some one of the disabilities enumerated in the saving clause of the statute of non-claim, against whom would he have his remedy after the removal of his disability? Certainly against the discharged administrator of Thos. H. Scott,and the administrator would have his remedy against the heirs upon the refunding bond of the heir, which the law authorizes and contemplates that he will take from the heir before making distribution of the property of the estate, in order to protect himself against contingencies of this character.

If then the claims of persons laboring under the disabilities enumerated in the saving clause of the statute of non-claim must be exhibited to the discharged administrator within the time limited by said statute, after their disabilities are removed, to keep them from being barred, in like manner the claim of Wm. H. Gibson should have been ex-

hibited to the discharged administrator of Thos. H. Scott within two years after it accrued.

Again, if the discharge of the administrator makes the heirs liable for this claim, then we contend that it should have been presented to them within the time limited by the statute for its presentation to the administrator, for the statute of non-claim was intended for the protection of the heir in the peaceable enjoyment of the property derived from the ancestor, and should be construed liberally in his favor.

THE CHIEF-JUSTICE delivered the opinion of the court.

Two questions are presented in this case. First, whether the statute of non-claim may be interposed as a bar to the complainant's demand; and, second, whether a bill in equity may be maintained against the heirs of a deceased co-surety for contribution, to the extent of the property descended to them from the co-surety?

The defendants are the heirs at law of Thos. H. Scott. His estate was administered and property distributed to the heirs, and the administrator was discharged long before the payment by Gibson of the money demanded, and before the cause of action had accrued upon the surety bond executed by Gibson and Scott. The administrator had given due notice of the presentation of claims according to the statute.

First. It is claimed on the part of the appellees that the claim was barred because it was not presented to the administrator within two years from day of notice; and because it was not presented to the discharged administrator within two years after the cause of action accrued.

It was settled in this State by the case of May vs. Vann, 15 Fla., 553, that as between co-sureties the relation of debtor and creditor does not exist until payment by one of the sureties, and that the statute of non-claim does not affect the rights of a co-surety who has paid the joint debt after

the expiration of the two years mentioned in that statute. In addition to the authorities cited in that case, that of Sibley vs. McAlister, 8 N. H., 389, may be referred to, with its citations, as very strongly establishing the correctness of the rule.

We can see no force in the suggestion that the claim should be presented to the discharged administrator. Without some statutory provision making such a proceeding necessary or proper, there can be nothing effected by such action. The administrator having been discharged, he is *functus officio,* and no act of his can affect the rights of the parties. He is no longer the representative of the deceased.

Second. The demand of the complainant having accrued, by his payment of the money which had become due by virtue of the joint obligation, after the discharge of the administrator and the distribution of the property to the heirs, the complainant proceeds against the heirs to reach the property of the intestate in their hands.

It is said that this suit cannot be maintained because, as was decided by this court in Gilchrist vs. Filyau, 2 Fla., 94, an action cannot be maintained against the heir upon the bond of the ancestor. That, however, was an action of *debt* upon the bond, seeking to charge the heir personally upon the covenant, and to recover a judgment for money due by the breach of the condition, without reference to the property descended; and it was properly held that in this country the action could not be maintained. That is not this case. This is substantially a proceeding to reach the property of the co-surety, or its proceeds, as a fund primarily liable to the payment of his debts, and the judgment sought by the bill is that the estate in the possession of the heirs shall be made to contribute rateably the proper proportion of the amount paid on account of the joint liability.

In Cox's heirs vs. Strode, 2 Bibb, 273, it is held that at common law the heir who had aliened the land descended

before suit brought, might discharge himself by pleading nothing by descent at the sueing of the writ, but a court of equity held him responsible for the *value* of the land descended. (Citing 2 Atk., 204; 1 P. Williams, 777; 2 Saund., p. 7, n. 2.) And if there be no administrator the complainant may proceed against the heir.

In Ellis vs. Gosney's heirs, 1 J. J. Marshall, 346, there was no personal representative of Mrs. Gosney. Her heirs or devisees were held responsible for her undertakings and liabilities to the extent of the property acquired by descent or will from her. The heirs were not expressly bound by the covenants, and could only be sued *at law* with the personal representative. It was, therefore, proper to sue them in chancery. It was, therefore, ordered that the value of the property devised be ascertained, &c. The same principles are enforced in Couchman's heirs vs. O'Bannon, and same vs. Slaughter, 1 Marshall, 387, 388.

It was held in Buford vs. Pawling's Ex., 5 Dana, 283, that heirs and devisees are responsible for the undertakings of their ancestor or testator, to the extent of the estate acquired by descent or devise from him, because the land was assets in his hands subject to the payment of debts, and the chancellor held him liable if he aliened it.

We have examined all the authorities cited by counsel on both sides in this case and many others, and we find ample support for the doctrine referred to, and nothing essentially conflicting with it as affecting the case at bar. Co-sureties are expressly bound to contribute pro rata the amount paid by each to the relief of all. (Act of Feb. 14, 1835; Th. Dig. 348.) And real estate is declared by statute to be assets liable to be sold for the payment of debts. The lands of the co-surety, Scott, have not ceased to be liable for the payment of his liabilities, according to the case presented by the bill and answer.

The bill of the appellant should, therefore, be sustained,

and the decree of the Circuit Court dismissing the bill is reversed.

THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, APPELLANTS, VS. THE ST. JOHNS RAILWAY COMPANY, RESPONDENT.

1. The Legislature intended that the trust created by the 2d section of the Internal Improvement Act should be subject to, and to some extent controlled by its subsequent provisions.

2. The 29th section of this act reserving to the General Assembly the power to grant alternate sections of swamp and overflowed lands to railroad companies to the extent therein mentioned, operated as a limitation upon the trust and the power of the Trustees.

3. The 13th section of the charter of the St. Johns Railway Company donating alternate sections of swamp and overflowed lands to this company for six miles on each side of its road, harmonizes with the principles and purposes of the act of Congress granting these lands and with the express provisions of the Internal Improvement Act of this State, and does not impair the obligations of any contract between the creditors of the trust fund and the State or Trustees of the Internal Improvement Fund.

4. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The Internal Improvement Act is not organic law.

Appeal from the Circuit Court for St. Johns county.

The bill alleges the organization of the company in pursuance of the provisions of its charter, the location of its road within the limits prescribed therein; that the company caused maps, plats, and diagrams to be made showing the line of said road, the connections, distances of township, range, or section lines, as required by the seventh section of said act, and designating the odd sections in fractional

sections within six miles on either side of the road, and of the termini thereof, and forwarded and filed with the officer required by law copies thereof. It further alleges the commencement of the work of construction within the time prescribed in its charter, and its continuation up to the time when it was interrupted and stopped by the belligerents in the late war between the States.

That at the time of this interruption the whole road had been graded to within one mile and a quarter of St. Augustine from Tocoi; that the iron for the road had been purchased by the company, and a large portion received at Tocoi and distributed as far as the eleven mile station; and that iron had been continuously laid down from Tocoi for four miles and a half in the direction of St. Augustine; and that the work of buying cross-ties, stringers, and iron was being carried on until after the commencement of the war between the States. That the iron at Tocoi, and a portion of that which had been laid down, was carried away, and an expensive passenger and other cars, depots, houses, turn-tables, and a trestle near the eleven mile station were destroyed by some of the belligerents. That before its work was interrupted and broken up by the operations of the military forces, the company was carrying the United States mails, passengers, and freight from Tocoi to the eleven mile station by rail, partly iron and partly wooden, and thence by other conveyances to St. Augustine; and that but for the operations of the war the road would soon have been completed, and transportation by rail have been furnished the entire distance of fifteen miles to St. Augustine; that in consequence of the disasters caused by the war, and the general prostration of the finances of the country, the company was greatly hindered and delayed in the completion of its road after the war, but as soon as it could partially recover from its losses it recommenced the work of construction of the road, and before the 23d of December, 1871, had

the remaining part of it graded and wooden rails laid down to St. Augustine, so that daily trains were run, carrying mails, passengers, and freight from Tocoi to St. Augustine, partly by steam and partly by horse power. That up to that time the company had been unable to replace the iron which it had lost, but that in the manner before stated it had substantially complied with the meaning and intent of its charter. That as soon as it could be done, in the prostrate condition of the company, iron was procured and laid down on the entire length of the road, new engines and cars purchased, and that the road was thoroughly equipped and in good running order by the day of , 1874. That it was not on account of any negligence of the complainant that the road was not completed within the time prescribed in its charter, but because of the secession of the State. That the State in accordance with its settled policy, and in consideration of the greatly increased value which the construction of the St. Johns Railway would give to the adjacent State lands, and also to the property of the citizens of St. Augustine and St. Johns county, granted to said railroad company for the purpose of aiding in the construction and equipment of its railway, all the rights, powers, and privileges, title and interest, of the State of Florida in the alternate sections of land, embracing the odd sections or fractional sections of land, the adjacent line of which is within six miles on each side, and from the termini of said road, the fee simple title of snch land to vest in said company as the work of the road progressed, that is to say, whenever one-sixth of the whole length of the road should be completed, then one-sixth of the land so granted should vest in said company absolutely in fee simple, to be disposed of by sale or otherwise as the company might deem most for the interest thereof, and also provided that for every one-sixth of said road so completed one-sixth of the lands so granted should vest in said company. That by the 8th

section of its act of incorporation the right of way of four hundred feet on each side of said road was also granted to this company to vest in it as fast as the road was continuously graded.

That the right to make such grants as are contained in said charter was reserved in the 29th section of the "internal improvement act;" and that the Legislature had power under said section to grant the alternate sections of the swamp and overflowed lands for six miles on each side of any such road which they might thereafter charter; that the St. Johns Railroad Company had in every respect complied with the provisions of this act in respect to drainage.

That the State has recognized the right of this company to exercise and enjoy the franchises granted in its charter; and that no forfeiture of any right or privilege has ever been claimed or adjudged, but that the State has acquiesced in and confirmed the exercise of the rights and privileges conferred under its charter by permitting the company to proceed to the full completion of its part of the contract in the complete construction and equipment of its road. That the value of the Internal Improvement Fund is much greater than all of its present liabilities; and that the grant to this company under its charter has increased the value of the even sections belonging to the fund which were before almost valueless. That the company having fulfilled its contract by the building, equipping, and keeping in good running order the said road, and complied with the requirements and consideration mentioned in the act, the right of way, as well as the odd and fractional sections granted in its charter, vested in the company in fee simple.

The bill then charges that the taking and selling these lands by the Trustees of the Internal Improvement Fund for the benefit of that fund was in violation of the charter of the company, of the Constitutions of the United States and State of Florida, by taking private property for public

use without compensation and without due process of law, and prays that the grant of the lands to the company may be decreed to be valid, and that the title to the same has vested in it in fee simple, and for injunction, account, and the payment to the company of the proceeds of such of said lands as had been sold by the Trustees.

The answer, filed March 2, 1876, by the Hon. W. A. Cocke, being solicitor for defendants, does not contradict any of the material allegations of the bill, but admits that the 13th section of the act incorporating the company grants to it all the right, title, and interest of the State of Florida in the lands therein mentioned.

It then alleges that this 13th section is illegal and inoperative, and carries with it no rights to the St. Johns railway for the alternate sections of land claimed in the bill; that these lands had irrevocably passed to the Trustees of the Internal Improvement Fund by the act of January 6, 1855, as a trust fund, to be strictly applied according to the provisions of said act.

It alleges further that the purposes of the trust are fully set forth and defined in the 4th section of said act, and that the lands cannot be given away so as to impair the definite purposes of the trust until it is accomplished. It admits that by the 29th section of this act it does appear that the power was given to the General Assembly to grant alternate sections of the swamp and overflowed lands for six miles on each side of any railroad that may hereafter be chartered, but alleges that this section is in contravention of the great and leading purposes of said act, and not only inconsistent with the trust, but that any construction which would give it the operation prayed for in the bill, would destroy the privileges of the trust, and give to subsequent Legislatures the power of impairing, if not destroying, the purposes of the act. That if the 29th section is capable of bearing the construction put upon it by complainant, yet,

nevertheless, they are not entitled to its provisions under the 30th section, which deprives any company of the benefits of said act failing to grade twenty miles of their road within four years from the filing of their acceptance of its terms, and the defendants deny that the complainant ever did comply with sections 30 and 6 of said act.

The answer then alleges that there are heavy debts resting over the property belonging to the trust fund, and a judgment for a very heavy amount, which it submits is a lien on the fund until paid, and that the lands mentioned in the bill are in the legal custody and control of the Trustees of the Internal Improvement Fund.

The case was submitted upon the bill, answer and exhibits in the court below, which, by its decree, affirmed the title of the company to the right of way and lands mentioned in the bill, and enjoined the defendants, the Trustees of the Internal Improvement Fund, from selling or disposing of said lands, or from interfering in any manner with the company in the use, occupation, or disposal of the same.

From this decree the defendants appealed.

Geo. P. Raney for Appellants.

The internal improvement act vested in the Trustees of the Internal Improvement Fund irrevocably all of the swamp and overflowed lands granted the State by the act of September 28, 1850, for the purpose of aiding the construction of the lines of railway and the canal mentioned in the 4th section of the internal improvement act.

No reservation of any right to appropriate any of said lands to any other purpose until after the railroad companies indicated by the provisions of said act should for five consecutive years pay six per cent. on the capital stock paid in and the interest on the bonded debt, and apply the sum of one per cent. yearly to a sinking fund. (sec. 27.) was

made, except that contained in the 29th section of said act. This reservation was a power for the General Assembly to grant to railroad companies subsequently chartered the alternate sections of said lands for six miles on each side of their roads, on the compliance by said companies with the provisions of the internal improvement act as to the manner of constructiong the road and drainage.

The manner of constructing the roads is particularly shown by the 6th section of such internal improvement act; and among other requirements, that the gauge should be five feet, the iron weigh not less than sixty pounds per lineal yard, as well as others, which will appear upon reference to said 6th section.

Chap. 734 of Laws of Fla. (Act of 1855) provided that the details of construction specified in said section, except the sixth specification therein, might be modified by the consent and approval of the Trustees of the Internal Improvement Fund, in so far as the companies accepting the provisions of said internal improvement act were concerned.

The pleadings show that there has been no compliance by the appellee with the requirements of said 6th section of the internal improvement law except as to drainage.

These lands having been vested in the Trustees as above stated, no diversion could be made of them for any purpose or upon any terms or conditions other than those stated in the said 29th section, until the juncture contemplated by the 27th section had been reached. The pleadings do not show that any such juncture had been reached, but do show that the fund had become involved, which fact is also shown by the laws of Florida.

The right to have the Internal Improvement Fund applied strictly in accordance with the terms of the internal improvement act, had become a vested right in the trustees of the fund for the benefit of all persons who might be holders

of any bonds endorsed by them and for all creditors of the same, and it was not competent for the Legislature to divert any part of said fund, except as allowed by the 29th section of said act, and any act or law pretending to so do is a nullity to this extent.

Assuming that it was the intention of the charter act of the appellee to permit the appellee to acquire any lands of the fund without complying with the requirements of the internal improvement law, we submit that the said charter act was unconstitutional. Cooley's Con. Lim., 126; Fletcher vs. Peck, 6 Cranch, 87; Winter vs. Jones, 10 Ga., 190; Chesapeake & O. C. Co. vs. B. & O. R. R. Co., 4 Gill & John., 1.

A compliance with the requirements of the internal improvement law, as to the construction of the road of any company claiming alternate sections under said 29th section, is a condition precedent to the vesting of the title to such lands, and the pleadings show that this condition was never performed, and consequently no title has ever passed from the Trustees or vested in the appellee. Railway Co. vs. Prescott, 16 Wall., 603; Comyns vs. Latimer, 2 Fla., 71; Jenkins vs. Noel, 3 Stewart, 60; U. S. vs. Baisdon, 11 Howard, 85.

The pleadings show that the appellee company did not comply with the requirements of its charter act by completing within five years its road, according to the specifications and requirements of its charter.

The charter act of the appellee does not expressly repeal the 6th or 29th sections of the internal improvement law, and every presumption should be indulged against an intention to repeal any part of said law. The charter act should be construed, if possible, so as not to come under the charge of having been intended to violate vested rights. Erwin vs. Moore, 15 Ga., 351; Lee vs. Foreman, 3 Metc., 114; Blain vs. Bailey, 25 Ind., 165; Cass vs. Dillon, 2 Ohio St., 607.

James M. Baker for Appellee.

The St. Johns Railway Company was chartered by act of Legislature passed in 1858. See pamphlet laws, 91. That under the provisions of the 13th section of said act the said railway company are entitled to alternate odd sections lying within six miles on either side of said road and the termini thereof; also the right of way specified in charter. That said charter was a valid contract between the State of Florida and said company, made upon good and sufficient consideration therein expressed. 16 Wallace, 232; 6 Cranch, 137; 4 Wheaton, 518. That the 29th section of the internal improvement act authorized the Legislature of the State to make grants of alternate sections of land for building railroads not belonging to the system of internal improvements adopted under the said act. See Act.

It is claimed by the Trustees of the Internal Improvement Fund that the said grant to the St. Johns Railway Company was in violation of the internal improvement act, and impaired the obligation of the contract vesting certain lands in them as such Trustees. Cooley on Con., 357.

That said section 29 being a reservation of power to the State, all persons contracting with the State or the Trustees are charged with notice of such reserved power over the fund.

The powers exercised in making said grant were not in violation of or inconsistent with the provisions of said act, but were in furtherance of a well-considered system of internal improvements for the development of the State.

It was understood and agreed in the argument of this case in the court below that no forfeiture of charter by the company would be claimed, and that the road was built and the lands granted were set apart as alleged in the bill, and the case was submitted on bill and answer to save time and secure a hearing before the next term of the Supreme Court.

The only questions submitted to the court below were—first, that the act granting the lands was unconstitutional as impairing the obligations of a contract; second, that the St. Johns Railway was not built in accordance with the provisions and specifications of the internal improvement act.

The 29th section of the act is deemed sufficient answer to the first objection. If the Legislature had reserved the right to make the grant, they had the power to specify the terms and restructions which would constitute the consideration. One Legislature had no right to limit or restrict the action of a subsequent one in the discharge of a constitutional function or power. Cooley on Con., 125, and note.

If the Legislature of 1858 had the right to make such grant of land for a specified purpose, such as the building of a railroad, they had the right to fix and regulate the restrictions and terms.

If any terms were specified in the reservation of power in the 29th section, the subsequent Legislature had the right to modify and change them, if deemed advisable.

That such change would not interfere with vested rights under the act; the power to make the grant being admitted, the manner, terms, specifications, and considerations were matters solely between the State and the grantees, as they were the only parties interested.

It is contended that no land could vest in this company under said grant under the terms of the internal improvement act until twenty or thirty miles of the road should be completed, and that this road being only fifteen miles long, no land could vest, which, if correct, would defeat the grant. The Legislature, however, in the exercise of its power, authorized the grantees to take on the completion of every two and a half miles or one-sixth of the whole road.

The charter changed the restrictions and specifications of the act of 1855.

The road being short and of no great commercial impor-

tance, the charter only required sufficient weight of iron to transport all the freight and passengers offering between the termini of the road.

The legislative grant in this case left nothing further to be done by the State or its agents; the act itself was the grant, no deed was required. The contract could not be revoked by the State unless for want of consideration; the contract is considered in such cases executed. Potter on Dwarris, 478.

Whether a law is void for repugnancy to the constitution is at all times a question of delicacy which ought seldom, if ever, to be decided in the affirmative in doubtful case. Potter on Dwarris, 65.

JUDGE WHITE, of the Second Circuit, (sitting in the place of Mr. Justice Westcott, disqualified,) delivered the opinion of the court.

There are two questions involved in this case—

First. Whether the 13th section of the St. Johns Railway charter granting swamp and overflowed lands to this company is unconstitutional, as impairing the obligation of contracts arising under the internal improvement act of January 6, 1855?

Second. Whether the St. Johns Railway was constituted in accordance with the provisions and specifications of the internal improvement act; and, if not, whether the doing of this was a condition precedent upon which the grant to it should take effect?

The lands granted to the company are a portion of those which were granted to the State by act of Congress of September 28, 1850. This act specifies the object and conditions of the grant, and the Supreme Court of the United States, commenting on it, says: "It is not doubted that the grant by the United States to the State, upon conditions,

and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction, competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the contract. The grant required the State to appropriate the lands granted to the purpose of reclaiming them." McGhee vs. Mathis, 4 Wallace, 155.

From this case we see that it was the opinion of the Supreme Court of the United States that any disposition of the lands for objects and purposes other than those of the grant, and in such a manner as to defeat these, would be a violation of this contract. This leads to the inquiry whether the act of the Legislature consolidating *them* with the lands granted to the State for internal improvement purposes, and vesting them in trust under the second section, was enacted with a view and intention of carrying into effect the contract entered into under the act of Congress. It cannot be supposed that the Legislature by this act intended to violate this contract, but it must be assumed that the contrary was their intention.

By referring to the act of Congress, we find that the object of the grant was to enable the States to *reclaim* these lands for settlement and cultivation, and the means of doing this, as pointed out in the act, was by the use of the proceeds of these lands, or the appropriation of the lands in kind. The only condition annexed to the grant was that they should be applied exclusively, so far as necessary, to the purpose of reclaiming said lands by levees and drains. Wherever these means were not necessary, a full discretion was left to the States in the choice of other means, not inconsistent with the grant, which they might deem most appropriate to carry into effect its object. Some of them might be best reclaimed by means of drains, some by levees,

and some by both combined. But the States in which they were situated were necessarily to be the judges and to have the power of determining the necessity of either, or both modes; or whether the object could be better accomplished to any extent by other methods.

It is true, that the leading object of the Legislature in passing this act seems to have been to provide for and encourage a liberal system of internal improvements in this State, and for this purpose they set apart all of the internal improvement and swamp and overflowed lands acquired by the grant, and declared them to be a separate and distinct fund, to be strictly applied according to the provisions of the act. (Section 1.) For the purpose of assuring a proper application of this fund for the purposes therein declared, they vested these lands in five trustees, by the second section, to be held by them *in trust for the uses and purposes thereinafter provided.* The leading and primary use and purpose thereinafter provided, to which the fund was made applicable, was to aid in the construction of those lines of road and canal mentioned in the 4th section, and which have been held by this court in all of its adjudications of this act to be a State system. The terms, conditions, and manner in which this aid should be extended to roads which might accept its provisions were prescribed in the act. Another use and purpose for which this fund was set apart and to which it was made applicable was that provided in the 16th section. Finally, these lands were to be applied in such manner as might be directed by the Legislature upon the contingencies mentioned in the 27th section. But all of these uses were intended to be subject to the power reserved to the General Assembly in the 29th section of the act to grant alternate sections of the swamp and overflowed lands, for six miles on each side, to such railroads to be thereafter chartered, as they might deem proper.

We have now the grant by Congress, its objects, *and the*

legislative action and power over the subject, and we are of opinion that in passing this act, the Legislature intended as one of its main objects to carry into effect the purposes of this grant. If this intention can be collected from the act, it must control its construction. That such was its intention is evident from the 16th section, which provides that "the trustees shall make such arrangements for drainage of swamp and overflowed lands as in their judgment may be most advantageous to the internal improvement fund and the settlement and cultivation of the land."

This is one of the modes of reclaiming these lands pointed out in the act of Congress. This intention is further evident from the 29th section, in which the power to grant alternate sections is reserved to the General Assembly, which is limited to this class of lands granted by Congress, and must be construed in reference to this grant, and as one of the means of reclaiming it.

It is clear from these provisions that the Legislature intended that the trust created by the second section of this act should be subject to, and to some extent controlled by its subsequent provisions.

As further evidence of this we refer to the 28th section, in which the right of way is granted, and to the 15th section, in which the alternate sections of State lands for six miles on each side are granted to the different companies which might thereafter construct portions of the lines of road indicated in the 4th section, "but the title to the same shall not vest in the company except as the road progresses, and not until thirty miles are completed, when the company may sell one-half of the same within said thirty miles, and on the completion of thirty additional miles, then they may sell the balance of their lands remaining unsold in the first thirty miles, and so on for each division of thirty miles until the road is completed." It will be noticed that the grant of the right of way is unconditional; that of the alternate sec-

tions was to take effect upon the contingencies mentioned in the 15th section. Nothing further was left to be done by the State or the Trustees to vest the title of these lands in the companies; it was a present grant to take effect as the work progressed.

What stronger evidence could be given than that drawn from these sections, that the Legislature intended that the trust created by the 2d section of the act should be subject to, and to some extent controlled by, its subsequent provisions?

If correct in the position that the Legislature intended by this act to execute to some extent the contract arising under the act of Congress, and that they intended that the trust created by the 2d section of the internal improvement act should be subject to, and to some extent controlled by, its subsequent provisions, then the importance of the reservation of the power over this subject in the 29th section becomes more striking and apparent, as a necessary means of more fully carrying into effect the purposes of the grant by Congress.

It must be borne in mind that a very small portion of the lands vested in the Trustees were donated for general internal improvement purposes, not exceeding five hundred thousand acres; much the larger portion, probably nineteen-twentieths of them, was donated under the grant of the swamp and overflowed lands. When this vast domain is considered, much, if not most, of it lying out of the reach and beyond the influence for development of the great and leading works indicated in the 4th section, it would have been singular if some such power had not been reserved. No more efficient mode of reclaiming them could have been devised than that of constructing lines of railroad and canals through them, thus rendering them accessible to settlers, furnishing transportation for their productions, enhancing the value of the adjacent lands, and making these avail-

able for the fund and leading purposes of the trust, which would otherwise be valueless to it; and as such works producing such results are ordinarily beyond the capacity of individual capital and enterprise, it was a wise provision of the act to reserve the power and authorize the use of these lands for such purposes by granting portions of them to corporations, which, by combination of capital, could more successfully accomplish those objects. Railroads, more than any other modern institution, are considered the great developers of new countries, by hastening their settlement and rapid improvement, and in a State, situated as is a large portion of ours, with its greatly-diversified climate and varied productions, but much of it inaccessible for want of transportion, no one can estimate the value which such works would add to these lands and the resulting advantages to the fund, to say nothing of their influence in sustaining the roads which were the primary objects of the trust. This view of the law is sustained by sound reasoning, and no doubt influenced and controlled the body which devised and adopted the internal improvement act.

The present is the first case in which the reserved power of the Legislature over this fund, under the 29th section of the act, has been brought in question.

It is contended that the Legislature had no power to make the grant to the St. Johns Railway Company under the 13th section of its charter, because a previous Legislature had vested the lands so granted in the Trustees of the Internal Improvement Fund, and that they have become bound to the creditors of this fund by the terms of this contract, and that the 13th section is a diversion of a part of this fund from the purposes of the trust, and is, therefore, inoperative and void, because it impairs the obligation of said contract.

This court, in the case of Gonzalez vs. Sullivan, (reported in this volume) held "that the acceptance of the provisions

of the internal improvement act by those companies constituted such act, its requirements and benefits a portion of their several charters, and that such requirements became a law of their being."

We add that these companies, their creditors and the trustees, acquired all of the rights confirmed by this act, subject to its restrictions and reservations, which formed a part of the law of their contract with the State when they accepted its provisions.

All of the lands vested in the Trustees were pledged to the purposes of the trust, *except* such as the Legislature authorized to be otherwise applied, and these exceptions apply exclusively to the swamp and overflowed lands. These are the lands granted to the St. Johns Railway Company under the 13th section of its charter, and the grant is strictly within the limits and only of the lands named in the 29th section, which reserved the power to the Legislature to make the grant. If they vested in the Trustees, they did so *subject* to this reserved power of the Legislature to dispose of them in the manner and for the purposes mentioned in the 13th section of this charter.

This section is a contract between the State and this company, based upon a valuable consideration which the company has performed on its part, and the trust fund has derived its benefits in the enhanced value of the even sections which *remain* to the fund within the limits of the grant, which was a part of the consideration stipulated in the act.

In the case of Gonzalez vs. Sullivan, the court, in commenting on the case of Bailey vs. The Trustees, (10 Fla.,) say: "A holder of bonds before that time, issued under the third section of the act, sought to enjoin such appropriation of the fund, (to improve the navigation of a river) and the court held that he was entitled to such injunction. The ground of its action was that the measure of the right of the holder of the bond was the act of 1855; that upon the sale of

the bonds therein authorized rights became vested, a contract was brought into existence; that the terms of the law measured its obligation; and that the act appropriating funds for the improvement of a river was a violation of this contract in that it diverted a portion of the funds pledged for the payment of the bond contrary to the terms of the law;" and they add: "That case was authority for the position that an antecedent bondholder can set aside or enjoin an appropriation of the fund for any purpose to which it was not applicable at the time that his right as a bondholder attached. That was the true question in the case, the equity of the bondholder, the *cestui que trust*, was held effective to restrain and limit the power of the Trustees to the terms of the law as it was when his right accrued, and when the obligation of his contract attached." The law as it stood when the right of the creditor in this case accrued, and when the obligation of his contract attached, declared in express terms "that the alternate sections of the swamp and overflowed lands for six miles on each side may be granted by the General Assembly to such railroad companies, to be hereafter chartered, as they may deem proper." This was but a retention by the Legislature of its original power over the subject to the extent mentioned in the act, and to this extent operated as a limitation upon the trust and the power of the Trustees. It was notice to the creditor of the power therein reserved, was binding upon the Trustees, and entered into and became a part of the condition of the contract under which the bonds were issued and the creditor took them. They contracted with a view to this reservation and subject to the *exception* of these lands from the funds pledged. These are "the terms of the law as it was when his right accrued and when the obligation of his contract attached." It did not in any respect change the character of the trust, or in any other manner limit it. It but more clearly defined it by pointing out the limitation which

the Legislature intended to place upon it. Thus limited this power cannot be used to impair or defeat the trust, as contended by the appellants, but was intended and may be made to promote its objects by enhancing the value of the alternate sections remaining in the fund, and thus improving the trust property.

In the case of Gleason vs. The Trustees, this court held that it was the *duty* of the Trustees to *improve the trust property*. The court say: "The error of the defence here made by the Trustees is the conception that a contract to improve the trust estate by using a portion of it to render the balance more valuable in the manner authorized by the act; in other words, using a portion of the fund, or a portion of the land itself, to make the other more advantageous, is a violation of the trust. The construction contended for would render the Trustees powerless to drain one acre of the millions of acres of swamp lands now in their hands, thus preventing their improvement, and would prevent them from carrying out the manifest policy and spirit of the law on the subject. The performance of this contract, (for the drainage of lands) so far as appears from the face of the bill, is no diversion of the trust fund; it is its simple improvement in a manner authorized by the law of the trust." 15 Fla., 398-9.

So we think that the grant to the St. Johns Railway Company was but carrying out the true spirit and policy of the law on this subject, which we have seen was twofold, to reclaim these lands by granting the alternate sections as authorized by the 29th section, and by the use of this as one means to improve the trust estate in aid of the internal improvement system inaugurated by the act.

It would not be straining the law too far to say that the Legislature also intended by this means to extend to the remote and inaccessible portions of the State the benefit of this class of improvements. It is manifest then that the Leg-

islature intended to dispose of these lands in the various modes pointed out in this act in such a manner as to carry into effect the object of the grant by Congress, and at the same time to provide for the objects of the trust created by this act. To strike out the 16th and 29th sections would render the act obnoxious to the constitutional prohibition to the States forbidding the passing of any law impairing the obligation of contracts; for without these sections the act would be a total diversion of this magnificent fund from the object of the grant by Congress, and an exclusive application of it to another and different purpose from that contemplated in the grant.

By our construction of the internal improvement act, its various provisions are made to harmonize with each other and with the act of Congress, and each is made to stand and take effect.

It is in harmony also with the several decisions of this court on the different questions which have arisen under it. For these reasons we think the 13th section of the St. Johns Railway charter does not conflict, but harmonizes with the principles and purposes of the act of Congress granting these lands, and with the express provisions of the internal improvement act. It interferes with no vested right, nor does it impair the obligation of any contract between the State and United States, or the Trustees and creditors of the fund.

We come next to the consideration of the *second question,* whether the St. Johns railway was constructed in compliance with the provisions and specifications of the internal improvement act, and if not, whether the doing of *this* was a condition precedent upon which the grant to this company should take effect.

It is contended that a compliance with the provisions of the 29th section, as to the construction of the road, is a con-

dition precedent to the vesting of the title of these lands in the company.

The provision of the 29th section, as to the manner of the construction of the roads therein authorized, refers to the sixth specification of the sixth section of the same act, which regulates the gauge of the *different railroads* which were to constitute the general system under this act; the other specifications of this section were modified by the 1st section of the act of 14th of December, 1855. There is no question in this case as to drainage, the bill alleging that the company had complied with the provisions of the internal improvement act on this subject, and this is conceded by the appellants.

The only question is as to the guage of the road, and the appellants contend that the pleadings show that this condition was never performed, and that consequently no title has ever passed from the Trustees or vested in the company. But it will be apparent, upon examination of the 13th section of the act incorporating this company, that the investiture of the title to the lands therein granted was not made to depend upon any such condition, but was made to take effect upon the completion of one-sixth of the work, and so on for every one-sixth as the work progressed to its final completion. This is the only condition named in its charter upon which the grant should vest in the company, and upon the performance of this condition it became executed in the company.

But it is alleged that the charter act of this company does not expressly repeal the 6th and 29th sections of the internal improvement law, and that "every presumption should be indulged against an intention to repeal any part of said law."

We do not think the charter act of this company has any such effect, in so far as the 6th section of the internal improvement law was applicable to and binding upon the com-

panies which accepted its provisions. So far as these are concerned, as decided by this court, it became a part of "the law of their being."

But the act incorporating this company did not bring it within the system provided for in the internal improvement act; it was not required to accept its provisions, and had it accepted them, this would not have made it a part of the system without some clause in its charter or special act authorizing it; it is outside of and independent of the system, and the internal improvement act is no part of its organic law, nor is it bound by any of its provisions. Its rights and powers are derived solely from its charter.

The power of the Legislature reserved in the 29th section being an original power not parted with, is not and could not be limited by the 6th section so as to prevent any future Legislature from exercising its co-equal power over the same subject, unless rights had become vested arising under contract which brought into operation some constitutional limitation upon the exercise of such power by a future Legislature. This is a principle well established by all the authorities on this subject. See Cooley's Con., 125-6-7, note 1,126.

In the case of Gonzalez vs. Sullivan, this court used this language: "The court here simply say that the Legislature had the right to designate some objects of improvement to be constructed first, and to postpone others. While this may be true of this Legislature, it is also true of a subsequent Legislature that its powers were not limited by the power of the first, unless the act of the first was of such character as called into operation a constitutional limitation, and something more than a simple antecedent exercise of legislative power stood in the way of the exercise of the powers of the subsequent one. The internal improvement act is not organic law, and the power of one Legislature is no greater than another. Where the power of the subsequent one is limited, it results from the fact that the act of the first is of

such character that the organic law renders it inviolable through constitutional limitations covering the subject."

The specifications of the 6th section of the internal improvement act are the terms of a contract between the State on the one part and the companies which accepted it on the other, and between these parties these specifications were binding; and it was only upon a compliance with this and other provisions of the act that these companies were authorized to construct their roads and issue their bonds.

The reason why these companies were required to comply with the sixth specification of the 6th section in the matter of the gauge of their roads is given in this specification. It says: "The gauge of the different railroads shall be uniformly five feet, and connected continuously, so that cars or trains of cars can pass on all the routes *indicated* without changing freight." What routes were *indicated?* Those mentioned in the 4th section undoubtedly; and the reason of this requirement was to so construct the roads which were to form the general system that the cars or trains of each should pass over the roads of the others; and the subsequent portion of this specification makes it "the duty of the different railroad companies to adopt a uniform tariff for transportation of passengers and for hauling the freight in the cars of another company, and no discrimination shall be made by one company against the freight or passengers of another company."

The reason of this requirement is not applicable to the St. Johns Railway, which is no part of the *system,* but is remote from and disconnected with it. It is difficult to perceive how or in what manner the general system can be injured, or the rights of its creditors affected, by allowing a different gauge to another road with which it has not and cannot have a connection.

If the St. Johns Railway Company had been required to conform its gauge to that of the roads composing the gen-

eral system, the effect upon the fund and the rights of its creditors would have been the same; it would not have added to, or diminished the fund, or affected their rights, or made them different in any manner from what they are under the grant in the 13th section without this requirement.

So far then as these creditors are concerned, their rights are not affected, nor is the obligation of the contract between the State or Trustees and them impaired by the grant in the 13th section of the charter of this company; and this being so, it was competent for the Legislature to make the grant therein without requiring on their part a compliance with the 6th section of the internal improvement act.

But it is said the grant failed because this company did not complete its road within the time required by its charter. There is no forfeiture in the act of the grant upon the failure of the company to complete its road within the time prescribed in its charter, neither has there been any forfeiture of its franchises claimed or adjudged; but, as before stated, the title was to vest in fee simple in the company upon the completion of one-sixth of the road, and so on for every one-sixth until the whole road should have been completed, and this having been done, the grant became absolute in the company.

The decree of the court below must be affirmed.

JOHN D. C., APPELLANT, VS. THE STATE OF FLORIDA, EX REL. JULIA V. H., APPELLEE.

1. This court has jurisdiction to hear and determine an appeal from a judgment rendered by a Circuit Court in an action brought under the statute in relation to the maintenance of bastard children.
2. The court will not reverse the finding of a jury upon a question of fact, unless the verdict is so clearly and manifestly against the weight of

evidence as to suggest the presumption that it was produced by influences other than a proper consideration of the testimony.

3. The court, in the exercise of a sound discretion, has a right to excuse a juror, although he may be found competent to serve; and such an exercise of discretion is no error, although objected to by the parties to the action.

4. An exception to a portion of the charge of the court to the jury, to be available as error on review, must be to a separate, particular and specific portion of such charge. The language used by the court should be designated; a general exception fails if any part of such charge is correct.

5. The form of the judgment ordered by the court in such cases should be in strict compliance with the directions of the statute.

6. In an action of bastardy the mother has an interest in the result which may be taken into consideration by the jury in considering her credibility as a witness, and the court should have so instructed the jury when requested so to do by the defendant's counsel.

Appeal from the Circuit Court for Orange county.

There is a sufficient statement of facts in the opinion of the court.

T. Emmett Wilson and *Bolling Baker* for Appellant.

John W. Price for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action under the statutes relating to bastardy, commenced by affidavit and complaint of Julia against John before a justice of the peace, and was tried at the Orange county Circuit Court in 7th Judicial District before a jury at the May term, 1877.

Upon calling the jury to try the case, one I. W. B. was put upon his *voir dire* and held to be a legal juror, but a witness was then introduced by the plaintiff to show his incompetency, and was "thereupon excused by the court by virtue of the power claimed to be invested in the court in

its discretion to relieve the said juror from embarrassment, while the court admitted that the juror might be a legal juror in the case." To this ruling the defendant's counsel excepted.

Evidence was then introduced upon the part both of complainant and defendant, and the jury found that John, this appellant, was the real father of the child of which Julia had then been delivered.

Pending the trial, the counsel for the defendant asked the court to charge the jury—

First. That the burden of proof is on the plaintiff.

Second. The fact that the defendant is the father of the child must be established by a fair preponderance of evidence.

Third. If the weight of the evidence is not with the plaintiff, the verdict must be for the defendant.

Fourth. That it is the duty of the jury under their oaths to give to the whole testimony their most serious consideration, but it is their right to reject all such portions of it as they may believe to be untrue. It is their peculiar province to judge of the credibility of witnesses.

Fifth. In a prosecution for bastardy, the mother of an illegitimate child has an interest in the result, which, if she is called as a witness, may be considered by the jury in weighing her testimony.

The judge refused to so charge the jury and the defendant's counsel excepted.

The court then charged the jury as follows:

"This is a case brought under the statute by Julia against John. The plaintiff charges the defendant with being the father of an illegitimate child, which she gave birth to. The law permits a single woman pregnant or delivered of a child, who by law would be deemed and held a bastard, to take certain steps prescribed by law to establish the paternity of said child. The law gives full jurisdiction

to this court, through the intervention of a jury, to try the issue, whether the reputed father is the real father of the child or not. The law requires the complainant to be a single woman—this is a matter of proof. The statute of bastardy is that it must be the child of a single woman,unmarried at the time of conception, and being and remaining unmarried, not only at the time of parturition, but when the case is tried before a court of competent jurisdiction to establish the fact of the bastardy of her child. In the progress of that examination, which brings you to decide what is your opinion in the truth in relation to the issue in this case, whether the defendant under his plea of 'not guilty' is guilty or not, you.are in this, as in all other cases,the judges of the testimony, yet technically the plea of not guilty carries with it no weight, unless the party supports it by evidence before the jury, either in person or by testimony of others.

"To which said opinion and charge of the court the said defendant, by his attorney, did then and there except."

"Appeals to your sympathy are alike foreign to your strict legal duty as jurors to find according to the testimony. A large mass of scientific testimony has been offered for your consideration. It is not within the functions of the court to analyze this testimony, but you are to judge of the application and force,by your own comprehension,of its practical and legal effect."

"To which said opinion and charge of the court the said defendant, by his said attorney, did then and there except."

"The other part of the testimony, from the complaint to plea of not guilty, each sworn to by the respective parties, with the accompanying testimony, you must weight in accordance with its intrinsic merit as well as its application in this case with the attendant circumstances, to which said opinion, and charge of the court, the said defendant by his attorney did then and there except."

The defendant moved for a new trial, which motion was denied by the court, and judgment was ordered under the statute against the defendant.

The judgment entered by the court (after the formal recitals) read as follows:

"It is ordered, adjudged and decreed that the State of Florida do recover of and from the said John five hundred dollars for the use and benefit of the said Emma, to be paid in or by instalments of fifty dollars annually, or yearly, to the guardian of the said Emma to be hereafter appointed by the County Judge of Orange county, to be used for and towards the support and maintainance and education of said child Emma.

"And it is further ordered, adjudged and decreed that the said Julia do have and recover of and from the said John ten dollars for the necessary incidental expenses attending the birth of said child, paid and expended by the said Julia.

"It is further ordered, adjudged and decreed that the said John make, execute and deliver to the Clerk of the Circuit Court a good and sufficient bond, with good and sufficient sureties, in the name of and to the State of Florida, conditioned to be paid to and for the use and benefit of said Emma; and that he will pay or cause to be paid to said guardian fifty dollars per annum for and during the space of ten years.

"It is further ordered, adjudged and decreed that the said John pay all the cost of this suit, taxed at twenty-three dollars and twenty cents; and that said guardian aforesaid have execution for the amount due on said bond against said John and his sureties at any time he may fail to pay said instalments as above adjudged against him, and the defendant in mercy," &c.

From this judgment the defendant brings his appeal and assigns the following errors:

1. The court erred in refusing to charge the jury as re-

quested by the defendant's attorneys in the five propositions before recited.

2. The court erred in instructing the jury that technically the plea of not guilty carries with it no weight unless the party supports it before the jury, either in person or by testimony of others.

3. The court erred in refusing to grant a new trial, because the verdict was against the evidence, and because the verdict was against the weight of evidence.

4. The court erred in discharging the juror, Brooks, while admitting him after his examination on his *voir dire* to be competent.

5. The judgment rendered in the case by the court is erroneous and void for want of conformity to the statute.

The counsel for the appellee on the argument moved the court to dismiss this appeal, upon the ground that the court had no jurisdiction.

The Constitution, (Article VI., Sec. 5,) providing in what cases jurisdiction is conferred, is in these words: "The Supreme Court shall have appellate jurisdiction in all cases at law, and in equity, commenced in Circuit Courts, and of appeal from the Circuit Court in cases arising in the county court as a court of probate, and in the management of the estates of infants, and in all criminal cases commenced in the Circuit Court."

An action under the statute authorizing proceedings in bastardy is a *quasi* criminal action, and provides that upon a proper complaint a justice of the peace shall issue a process to a sheriff or constable, upon which the accused shall be brought before said justice; that the justice shall examine the female upon oath, in presence of the accused, touching such charge, and if, in his opinion, sufficient cause appears, shall bind the person so accused, in bond, with good security, to appear before the next Circuit Court for such county. Such court then has complete cognizance and jurisdiction of

such charge of bastardy, and causes an issue to be made up and tried by a jury. Thomp. Dig., 228.

The justice of the peace under this statute has no jurisdiction to hear and try the cause; his duties are merely those of an examining magistrate in a criminal action, issuing process upon which the accused is arrested, and taking the examination of the complainant. If, in his opinion, sufficient cause appears, he takes a bond for the appearance of the accused to the next term of the court having jurisdiction to hear and try the cause.

The issue is made up according to the rules and practice of the Circuit Court, and the trial is had by jury in the same manner and after the same form as provided for trials for other causes in that court. The judgment is the judgment of the Circuit Court, entered upon its minutes. The bond is in the custody of the court, and the money thereon is to be appropriated by the order of the court.

The statute, under which the accused is arrested, is a form provided by law for the purpose of getting into the Circuit Court, and to provide by law against the disappearance of the accused before the term of the court at which he may be tried. The affidavit of the complainant taken by such justice of the peace is filed in the Circuit Court, and becomes the complaint which the defendant is expected to answer.

We cannot see the want of jurisdiction suggested by the counsel for the appellee, and the motion to dismiss must be denied.

The jury in this case has passed upon the evidence introduced upon the trial and found the defendant the real father of the child of which the complainant was delivered. The examination and consideration of the facts proved is the especial duty of the jury. They determine from the evidence what is the truth, and have before them the witnesses as they are examined by the respective parties. Courts will

never interfere to reverse the finding of such a jury upon mere questions of fact, unless the verdict should be so clearly and manifestly against the weight of such evidence as to suggest the presumption that it was produced by influences other than a proper consideration of the testimony. The counsel for the defendant objected to the action of the court in excusing J. W. Brooks as a juror. He was called and examined upon his *voir dire,* and held to be competent, but upon the examination of a witness he was excused by the court to "relieve him from embarrassment." It does not appear from the record what that embarrassment was, or precisely upon what grounds he was so excused. It does appear, however, that the defendant was tried by a legal jury, to which he made no objection, and against whom he brings no charges. There can be no doubt of the discretionary power of a court to excuse a juror who, for reasons personal to himself, should be excused. If the defendant has a trial before a fair and impartial jury, it is all he can claim under the law. Brooks had not been sworn as a juror to hear and try the cause, but upon his *voir dire* to determine his competency.

In United States vs. Cornell, (2 Mason, 91,) Judge Story says: "Even if the juror has been set aside by the court for an unsufficient cause, I do not know that it is matter of error, if the trial has been by a jury duly sworn and impannelled, and above all exceptions. Neither the prisoner nor the government can have suffered any injury."

In State vs. Marshall, (8 Alabama, 302,) the court, speaking of the discretionary power to set aside any one summoned as a juror, uses this language: "We are not aware that this discretionary power has ever been doubted, nor are we able to perceive how justice could properly be administered without it. * * * Of all the discretionary powers of this court this would seem to be the least liable to abuse, as it is altogether conservative. Its exercise is

confined to the exclusion of improper or unfit persons as jurors, and how this could prejudice the accused it is difficult to conceive. If in its exercise the court should reject a person qualified to sit as a juror, how does that prejudice the accused? If a juror disqualified by law is put upon the prisoner, the case would be different, but if he is tried by an impartial jury he has sustained no injury." Tatum vs. Young, 1 Porter, 298; State vs. Ostrander, 18 Iowa, 435.

Unless there is a departure from the exercise of a sound discretion by the court in the matter of excusing jurors, this court cannot consider it error.

The counsel for defendant excepted generally to the charge of the court to the jury without definitely pointing out the language or the particular portion to which such exception is taken. The very language used by the court in its charge so excepted to should be designated to enable the appellate court to review it. A general exception applies to the whole charge, and if there be any part of the charge which is correct the exception fails. The counsel, it appears from the record, took these separate exceptions in the course of such charge, each one of which is general in its nature, and applies to all that has preceded it. Such an exception to be available on review must be to a separate, particular and specific portion of the charge.

The last assignment of error is directed to the form of the judgment entered in the case. The judgment may be defective in form and subject to correction. The bond is properly directed to be given to "the State of Florida." It should be approved by the court, made payable to the court, and the money laid out and appropriated under the special order of the court, from time to time made. The necessary incidental expenses attending the birth of the child should be included in the bond, and when collected turned over to the mother or other person designated by an order of the court. The directions of the statute in relation to the bond,

and the subsequent payment of the money collected thereon, should be closely followed, and the judgment of the court should be in strict compliance therewith. Subsequently, if a guardian is appointed by the judge of probate and qualified as provided by the statute, the court shall, as the money may be collected upon the bond, by order, from time to time, pay the same over to such guardian.

The bond has the same force and effect as a judgment of the court, upon which execution may issue as often as money becomes due thereon. Such execution must be issued upon the bond and in the names of the parties mentioned in such instrument.

The court has the entire control of the bond and the money collected, and must dispense it as directed by the statute, by its orders from time to time made.

The only other questions which arise are upon the instructions asked by defendant's counsel to be given to the jury, and which the court refused. It is true that the burden of proof was with the plaintiff, and also that the fact that defendant was father of the child must be established by the weight of evidence. To determine these very questions the jury was summoned and sworn. If of ordinary intelligence, as they undoubtedly were, they knew and appreciated their duties and responsibilities, and before rendering their verdict under their solemn oaths considered the whole testimony, and determined as to the credit to be given to the evidence. The instructions of the court to the jury, so far as these points were concerned, is fair and presents the case properly. It is not necessary for a court to charge the jury particularly upon every minor point. If the charge is fair and presents the case in an impartial manner, it is sufficient. 14 Mo., 97.

The court was, among the other points, asked to charge "that in a prosecution for bastardy, the mother of an illegitimate child has an interest in the result, which, if she is

called as a witness, may be considered by the jury in weighing the testimony."

The statute under which these proceedings were instituted provides that "if, upon the trial of the issue aforesaid, it should be found by the jury against the woman,or that such bastard is not the child of the reputed father, then the judgment of the court shall be that the defendant or reputed father be discharged, and that the woman making the complaint shall pay all costs occasioned thereby."

If the putative father had been acquitted upon the trial, the mother would not only have been bound to maintain and educate the child, but under this statute a judgment would have been entered against her for the costs of the proceeding. Here is an interest which affects the credit of the complainant, and as her credibility was a material question for the jury, the instruction asked for in this particular should have been given.

It was error in the court not so to instruct the jury, and for this reason the judgment must be reversed. Keating vs. State, 44 Ind., 449.

REED, STORY AND SAMUEL SULLIVAN, PLAINTIFFS IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The record showing that the defendants were brought into court, that they appeared by counsel, plead to the indictment, were tried and convicted, is sufficient evidence of a proper arraignment.

2. When the bill of exceptions does not bring up all the evidence taken upon the trial of the cause, the court will infer that there was sufficient introduced to warrant the finding of the jury.

3. Exceptions to the charge of the court must be taken at the time the instructions to the jury so complained of are given, and the evidence of that fact must appear in the bill of exceptions.

2. To enable a party to avail himself of the error in the court refusing to instruct the jury as requested, the attention of the court must be called to the particular points upon which such instruction is asked and that before the jury shall have retired to consider of their verdict.

Writ of error to the Circuit Court for Orange county.

There is a sufficient statement of the facts in the opinion of the court.

John W. Price for Plaintiffs in Error.

The first error assigned is that the defendants were not arraigned previous to being put upon their trial. There was no plea entered by them, though the jury were empannelled and sworn to try an issue then joined between the State of Florida and the defendants at the bar, who could only be legally tried upon an issue which had previously been joined by the arraignment and plea of the defendants.

The provision of the criminal law is so positive in the requirements thereof, that all persons charged with a felony must be first arraigned and plead before such person is put upon trial. The proposition is so plain that I think it unnecessary to say more here. See Bishop's Criminal Procedure, 728, and 13 Fla. R., 632, where the court suggests how the arraignment shall be made.

If there was no plea entered to raise an issue, the verdict of the jury was illegal and void. See 2 Fla. R., 42.

The second assignment of error opens a much larger field for consideration than the first. The error is shown as manifest as the first.

The first inquiry then is, "What is an animal?" "An organized living being, endowed with sensation and power of voluntary motion, and also characterized by taking its food into an internal cavity or stomach; by giving carbonic acid to air, and taking oxygen in the process of respiration; by

increasing in motive power or action aggressive force with progress to maturity."—*Webster.*

"An animal after it is dead changes to an inanimate mass—a carcass. The dead body of an animal, a corpse." *Webster.*

"*Animal Property.*—A name given to every animated being endowed with power of voluntary motion. In law it signifies all animals, except those of the human species." *Bouvier's Law Dictionary.*

We are all legally compelled to admit that as soon as an animal dies, from the moment death takes place in such animal it ceases to be animal; from the moment it is rendered motionless by death, it ceases to be an animal and becomes a carcass, a corpse.

The animal named and described in the indictment, for the altering of whose mark these defendants were indicted to put upon their trial and convicted solely and entirely by evidence which showed conclusively that the animal whose mark had been changed was dead before the altering had taken place, was the altering the mark of a dead hog—the carcass of a hog—which had at the time ceased to be an animal.

The Act of 1868, Sec. 51, page 78, says: "Whoever,&c., shall alter the mark of an animal with intent to claim the same, or to prevent identification by the true owner, shall be punished," &c. The general principle of law is that every person is presumed to be innocent until proved guilty, as shown by authorities hereafter cited. That being one of the charges in the indictment, the State undertook to prove that the mark of an animal had been changed.

The State did prove that there had not been an animal's mark changed, for the State's evidence showed the animal named therein was dead before the mark was altered—had before ceased to be an animal.

There should have been no evidence admitted unless rele-

vant to the issue. As soon as it was shown by the evidence that the animal named and described in the indictment was dead before the mark was altered, all evidence relating thereto should have been excluded by the court. See 1 Greenleaf on Evidence, page 71.

The third assignment of error covers a still larger field, one that should be closely examined, and every error committed therein be corrected, and the legal right to justice be accorded to every citizen entitled thereto, without unreasonable delay, in our land of constitutional liberty, where the citizen is presumed to be innocent until proved guilty.

The statute of this State requires the Judge of the Circuit Court to charge the jury upon the law of the case only. Sec. 8 of Act approved January 4, 1848. See Acts of 1847, page 10, and Secs. 1 and 2, Act approved March 2, 1877. See Acts of 1877, pages 42 and 43.

It will scarcely be contended that a charge of the court is legal or proper where only a portion of the law is given, more especially under the act of 1877. After the court has been requested in writing to charge in writing, whenever that request is made in writing according to law, it then becomes the duty of the court to charge the whole law applicable to the case. Having prefaced my remarks on this assignment of error, I will now examine the charge of the court as given in this case, from which we will learn and ascertain how far the requirements of the law were executed by the court in his charge given in the case at bar.

Without admitting the correctness of any portion of the charge of the court, I pass over what occurs therein before the following: "If a party cuts out the mark of an animal which he had no right to alter, it is for him to show that there are no circumstances nor intent involving fraud."

It is one of the elementary principles of evidence that whoever asserts an affirmative of any proposition, and asserts that a right has been disregarded or a wrong com-

mitted, it is incumbent on the party asserting the affirmative to establish that proposition according to the rules of evidence.

The charge of the court disregards this well-known elementary rule of evidence, and a well-known presumption of law, viz: "That every person is presumed to be innocent until proved guilty." That being one of the allegations of the indictment, it becomes necessary for the State to establish that allegation by evidence to the satisfaction of the jury. It is inevitable, a legal necessity, for the affirmant to establish that charge with as much certainty as any other charge.

The State by making that charge in the indictment undertook, or undertakes, to establish that allegation by proof. The court in this case changed the legal force of the proposition, made it incumbent upon the defendants to prove themselves innocent before the State has proved or established their guilt.

The mere cutting the ear of an animal is not in itself a violation of law; it may be wrongfully done and not be criminal; it must be fraudulently done, and done for one of the purposes named in the law, viz: "To prevent identification, or with intent to claim the same." But the court says that the mere fact of cutting out or altering the mark of an animal, without legal authority, constitutes the offence of crime, and compels the defendants to prove that they did not alter the mark of the animal named in the indictment to fraudulently claim the same, or prevent identification by the true owner.

They must prove that they did not commit a crime before the State proves that they have committed an offence, or are guilty of any crime.

This charge changes the whole fundamental rule of enforcing the criminal law, or to establish crime by the production of legal evidence, as well as the right to the pre-

sumption of innocence, thereby taking away the very inalienable right of the citizen; that uprooted and destroyed, convicted without proof of guilt, every guarantee is gone, and the legal presumption of innocence is no longer a protection or barrier; which is contrary to and against the law. See 1 Bishop's Criminal Procedure, Secs. 976, 978, 980, 987, 988, 989; 18 Wallace, U. S. S. C., 516; 7 Blackford, 421; 26 Maine, 312; 1 Gray, 61; 14 Gray, 415, 418.

The sixth assignment of error, that the defendants were entitled to any reasonable or rational doubt resting on the mind of the jury as to their guilt, is a legal proposition and right so well settled by criminal jurisprudence that I will refer to the authorities above cited, and leave that question with the court.

The seventh assignment of error is one which raises many important questions for and on behalf of the defendants. The grounds were argued in the Circuit Court, so far as counsel were allowed to do so, it being the opinion of the Circuit Judge that counsel had no legal right to argue a motion for a new trial, and could only do so by the permission of the judge of that court, though the statute of this State says "that the refusal to grant a new trial may be assigned as error." See Acts of 1847, page 10.

The material portion of said assignment has already been noticed in the remarks on the charge of the court.

The eighth assignment of error will only require me to call the attention of and refer the court to the following authorities, viz: 13 Iredell, 63; 30 Vt., 100; 1 Metc., 13; 6 Ohio, 467; 4 Strobart, 266; 36 Miss., 677; 29 Miss., 32; 20 Ark., 216; 7 Grattan, 641; 32 Vt., 491.

The jury were misled by the admitting of admissions of the defendants, believing that they were compelled to take the confessions of one against both.

The ninth assignment of error has already been disposed of in the authorities cited to support other assignments of

error, and which have been brought to the notice of the court.

The Attorney-General for the State.

1st. The record does show that the prisoners were arraigned, and thereby refutes the statement to the contrary implied in the first assignment of error. It shows a substantial compliance with the form laid down in Dixon vs. State, 13 Fla., 633.

It is true the record does not specifically state that the indictment was read to the prisoners, or in the language given in the Dixon case. It shows that they were "arraigned" and "plead not guilty."

In the Dixon case this court says, on page 634: "There is so much of an arraignment in this record as identifies the prisoner and declares his personal presence in court, and whatever may be the rule when an arraignment is entirely omitted, we are satisfied that the failure to read the indictment, or to demand of the prisoner whether he is guilty or not guilty, and asking him how he will be tried, is cured by his appearing and pleading to the indictment. The purpose and the end of reading the indictment and making the demand is to advise the party of the accusation, and to learn what he has to say in reference thereto, and if he advises himself and answers the accusation by plea he waives these formalities, which are mere preliminaries looking to that result." State vs. Hughes, 1 Ala., N. S., 657; People vs. Corbett, 28 Cal., 330; Douglass vs. State, 3 Wis., 820; Cook vs. State, 26 Ga., 593.

2d. As to the second error assigned, to-wit: "That the court erred in allowing the witnesses to testify that the mark of an animal was altered after it was shown by the evidence that the animal was dead before the mark was altered," it is not shown by the record or bill of exceptions that any ex-

ception was made in the trial to the court allowing the witness to so testify. Nor is there any thing in the record or bill of exceptions to show that there was testimony to the contrary tending to prove that the animal was dead when the mark was altered.

3d. As to the third and fifth errors assigned, which charge that there was error in the charge of the court to the jury, we respectfully submit that the record does not show that any exception was taken at the trial to the charge of the court in any respect whatever.

"Exceptions to the charge cannot be sustained unless the instruction complained of were excepted to while the jury were at bar." Godwin vs. Bryan, 16 Fla.; State vs. Clark, 37 Vermont, 471; Phelps vs. Mayen, 15 How., 160; Nabenbruch vs. Shaver, 2 W. Va., 285; Mallingly vs. Moranville, 11 Mo., 604; McKill vs. Wright, 4 Iowa, 504; Anderson vs. Hill, 12 S. & M., 679; Francis vs. State, 6 Fla., 306; Burns vs. Commonwealth, 3 Metcalf, Ky., 130; Error, 5th U. S. Dig., 1st series, sec. 2,150.

4th. As to the 4th, 6th, and 8th errors assigned, which complain of the judge not having charged the jury to a certain particular effect, we submit that there is nothing in the record or bill of exceptions which shows that the judge was requested to so charge the jury.

"An omission on the part of a judge to instruct the jury on a particular point, if no instruction be asked from him on that point, is not error." 1 Bp. Crim. Pro., sec. 980; State vs. Oneal, 7 Iredell, 251.

5th. As to the 7th error assigned, we reiterate the propositions and authorities submitted as to the 3d and 5th, with the remark that there were no exceptions taken at the trial to support it or the grounds of the motion for a new trial.

6th. The other assignments of error are merely general. Laws, Chap. 2096.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

These defendants were tried upon an indictment found for fraudulently altering the marks of an animal, under Section 54, Chapter 4, of "An act to provide for the punishment of crime and proceedings in criminal cases," approved August 6th, 1868.

The first error assigned by the plaintiffs in error is, that there was no arraignment by the court of these defendants before trial as contemplated by the law. The record presented to this court upon this point is as follows:

"Now on this day comes Alexander St. Clair Abrams, who prosecutes the pleas of the State of Florida in this behalf, and J. W. Price and J. H. Allen, counsel for defendants, and the defendants being brought into court and arraigned pleaded not guilty, and thereupon comes a jury of good and lawful men, to wit: 1. W. A. Lovell; 2. Newton Ennice; 3. W. R. Barnhart; 4. M. G. Campbell; 5. M. J. Doyle; 6. John Ivey, who, being empanelled and sworn to try the issue between the State of Florida and the defendants according to the evidence, after hearing the evidence and the argument of the counsel, and having received the charge of the court, rendered the following verdict, to wit: 'We the jury find the prisoners guilty.' "

There is sufficient in this record to identify the prisoners, to show that they were brought into court; that they were represented by counsel, plead to the indictment, were tried by a jury and found guilty of the offences with which they were charged. The very question raised by this assignment of error has been fully considered and determined in this court in the case of Dixon vs. The State, 13 Fla., 631.

The counsel for the defenants, after verdict, moved for a new trial upon several grounds; the first being "that the said defendants were illegally tried, having been tried and

convicted by six persons empanelled as a jury, which was illegal and contrary to the constitutional rights of the defendants." This ground of error having been disposed of by this court in the case of Gibson vs. the State at the last term, was waived upon the argument of the case in this court. The other assigned grounds of error made and argued upon such motion for new trial, all related to the charge of the court to the jury, save only the sixth point, which was as follows: "And for newly-discovered evidence material to their defence in said cause." From the record it appeared that this motion was made and overruled by the court on the 23d day of May, and on the 8th day of the subsequent August two affidavits were filed, which seem to have been made to be used upon such motion, but neither of these affidavits relates in any way to the discovery of new evidence. The record does not show that all the evidence given upon the trial is incorporated therein. Only a portion of the evidence of some of the witnesses is given. The judge who signs the bill of exceptions expressly notes thereon over his official signature this statement: "In signing the above bill of exceptions, I don't say that the above specifications of the testimony are accurate, as I kept no record of the testimony of the witnesses." Under such circumstances, the court must infer that the evidence introduced upon the trial of the cause was sufficient to warrant the finding of the jury, and authorize the court below to overrule the motion for a new trial.

No exception to the introduction of any of the evidence which is set out in the bill of exceptions, or to any ruling of the court, seems to have been taken during the trial, and there is nothing appearing upon the face of the record to suggest that any evidence was admitted except with the consent of the defendants. The third and fifth errors assigned are, that the court erred in its charge to the jury in two different and distinct portions thereof, but we do not find

in the record any evidence that any exception was taken by the counsel for the defendants to any specified or particular part of the charge upon the trial, and that therefore the court cannot review those errors if they exist. The rule is well settled that the exceptions cannot be reviewed unless they were taken on the trial and at the time when the instructions so complained of were given to the jury, and the evidence of that fact must appear in the bill of exceptions. Godwin vs. Bryan, 16 Fla.; Cameron vs. The State, ib.; Hasbaugh vs. City of Monmouth, 74 Ill., 367; 2 Phillips Ev., 1,000, and notes.

The fourth, sixth, and eighth assignments of error have for their ground the failure of the court to charge the jury upon certain points in each of said numbered assignments separately mentioned. There is not in the record any request made upon the part of the defendants by their counsel to the court to instruct the jury upon any one of these several points. Such instructions should have been asked by the counsel if they were deemed essential at the time, or before the court charged the jury, and had the court then refused, exceptions should then and there have been taken to enable counsel to avail themselves of the alleged errors upon review. The attention of the court should be called to the particular points upon which it is asked to instruct the jury, and this must be done before the jury shall have left their jury box; if such request is not made until after the jury shall have retired to consider of their verdict, it is too late. 1 Bishop Crim. Pro., 980, and cases cited; 2 Phillips' Ev., Cowen & Hill's Notes, 1004.

The judgment must be affirmed.

EX-PARTE ALFRED HUNTER.

Where a party has been tried and convicted of an offence before a Justice's Court, and a fine imposed under the statute, and the Justice in his commitment recites the fact of the conviction and the imposition of the fine, and further directs that the accused "be conveyed to the county jail to be employed at such manual labor as the County Commissioners may direct, which time shall not exceed ninety days," and the statute under which the accused was convicted limits the term of imprisonment to which he may be sentenced to sixty days: *Held*, That so much of the commitment as seems to authorize an imprisonment for ninety days may be treated as surplusage and void, without affecting the legality of the commitment for the non-payment of the fine. The term of the imprisonment for such non-payment is regulated by the statute. The writ of *habeas corpus* is refused.

Alfred Hunter filed a petition praying a writ of *habeas corpus*, directed to the sheriff of Leon county.

The facts of the case are stated in the opinion of the court.

John Wallace for the Petitioner.

The Attorney-General, contra.

THE CHIEF-JUSTICE delivered the opinion of the court.

It appears by the petition and papers exhibited that Alfred Hunter and another were tried before a justice of the peace, upon a charge of larceny of property of Peter Williams of the value of $5, within the county of Leon; that a jury was empanelled, and under oath rendered a verdict of guilty; that the accused were each sentenced to pay a fine of $25, and costs $3.85; and that they "be conveyed to the county jail to be employed at such manual labor as the county commissioners may direct, which time shall not exceed ninety days each." The justice of the peace had jurisdiction to try the parties for the offence and to impose the fine. Ch. 2093, Laws 1877, §§1-14; Ch. 1693, Laws 1869, §1.

The trial was had on the 28th December, 1877, and the offence was committed on the 27th.

The commitment was not made out in very artificial form, but shows the complaint, the trial, the verdict, the sentence to pay a fine, and the commitment to the jail. The sentence as to the fine is sufficiently definite.

It is evidently intended (and is so treated) that the imprisonment mentioned is in pursuance of the 14th section of the act of 1877, (Ch. 2093) which requires that in case the fine is not paid the accused shall remain in custody, and after twenty-fours he shall be committed to the jail of the county, there to be imprisoned until the fine and costs shall be paid, not exceeding three months.

The part of the commitment relating to the ninety days' imprisonment must be held to relate to this provision, and will not be treated as a part of the sentence. If it was a sentence of ninety days' imprisonment, it must be held to be void, as the justice had no power to impose a sentence of imprisonment for a longer term than sixty days, and the result is that the fine and costs only were lawfully imposed by the sentence and judgment.

There is no pretence here that the petitioner has paid, or offered to pay the fine and costs, and the statute requires that he shall be imprisoned, and put to such labor upon the roads, &c., as the county commissioners may direct.

The accused is confined, then, pursuant to law, and can be discharged only upon payment of the fine and costs, or by his earnings at labor of the amount, or by the expiration of three months from the time of commitment to jail for non-payment, or by appealing and giving security, or by a remittance of the penalty by the executive action.

If any errors or irregularities were committed by the justice, in the progress of the trial or by the jury, the remedy is by appeal to the Circuit Court.

Upon the petition and the facts before us, the petitioner is not entitled to the relief prayed, and the writ is refused.

DECISIONS

OF THE

Supreme Court of Florida.

JUNE TERM, A. D. 1878.

THE STATE OF FLORIDA, EX REL. THE ATTORNEY-GENERAL, PLAINTIFF, VS. PETER KNOWLES, ET ALS., RESPONDENTS.

1. Chapter 3045 of the Laws of Florida, being "An act in relation to the Florida Agricultural College," is passed in compliance with the constitutional requirements covering the subject. The act being amended by this act is referred to by its title, by its chapter, and the sections amended are re-enacted and published at length. This is sufficient.
2. The Florida Agricultural College is a public corporation. It was founded by the State of Florida with public moneys derived in trust from the government of the United States. It is within the power of the Legislature to change the Trustees named as corporators.
3. The corporators in such a corporation having made a particular contract with an individual, is no reason why such corporators are not subject to legislative control and removal.

The Congress of the United States, by an act approved July 2, 1862, granted to the several States an amount of public lands, to be apportioned to each State, equal to thirty thousand acres for each Senator and Representative; or, where there were no lands within the State subject to sale at private entry, land scrip for the amount in acres; the moneys derived from the sale of this land or scrip to be invested and to constitute a perpetual fund, the principal to remain forever undiminished, and the interest to be appro-

priated to the endowment and support of at least one Agricultural College.

This grant was made on the following condition, viz:

1. That the assent of the several States should be signified by legislative acts within two years from the date of the approval of the act.

2. That at least one college should be provided within five years. If these conditions were not complied with within the time specified, by any State, the grant to such State should cease.

By a subsequent act of Congress, approved July 23, 1866, the time for accepting the grant was extended to three years from the passage of the act, (July 23, 1866) and the time for providing the college to five years from the filing of such acceptance with the Commissioner of the General Land Office.

The Legislature of Florida, by Chapter 1766, entitled "An act to establish the Florida Agricultural College," approved February 18, 1870, (seven months after the expiration of the time allowed by the act of Congress of July 23, 1866,) signified its acceptance of the grant by providing for the establishment of an Agricultural College.

The trustees named in the foregoing act never met and organized, as provided in the act, or accepted the charter, and no steps were taken towards establishing the college.

In 1872 the Legislature passed an act entitled "An act supplementary to Chapter 1766 of the session laws of A. D. 1870, being 'An act to establish the Florida Agricultural College,'" (Chapter 1905) approved February 17, 1872.

The corporators named in this latter act, or a majority of them, met on the 20th day of March, 1872, and organized as directed in the act by electing the required officers and an executive committee, and authorized the executive committee to ask for and receive the land scrip to which the State was entitled. Under this authority the executive commit-

tee applied to the Secretary of the Interior for the land scrip, but the application was refused on the ground that the State had not complied with the conditions of the acts approved July 2, 1862, and July 23, 1866, and consequently was not entitled to the scrip. Then Congress, by an act approved December 13, 1872, directed the Secretary of the Interior to deliver scrip for ninety thousand acres to the Secretary of the Board of Trustees of the Florida State Agricultural College.

In accordance with this act the scrip was delivered to the order of the Secretary of the Florida State Agricultural College, and was sold by the trustees and investments made in bonds of the State of Florida. The trustees then proceeded to complete the organization and establishment of the college, and to select a site for the location of the college buildings, in accordance with section 10 of Chapter 1766. To this end they advertised for propositions from different localities desiring the location of the college for contributions to aid in its construction, and received from Wm. H. Gleason an offer of over two thousand acres of land, situated at Eau Gallie, on condition that the college should be permanently located at that place. The trustees accepted this offer, and a contract was made with Mr. Gleason, by which the land was conveyed to the college, and the location of the college was fixed at Eau Gallie, where the trustees commenced the construction of buildings.

The Legislature of 1877, by an act entitled "An act in relation to *the Florida Agricultural College,*" approved March 17, 1877, (Chapter 3045) provided for a change of the entire management and control of the Florida State Agricultural College, by removing the trustees or directors created by Chapter 1905, and substituting others in their stead; and also a change of the organization of the officers and committees, and the removal of the college from Eau

Gallie, where it had been located under the contract made with Mr. Gleason.

Soon after the passage of this act, the persons therein named as corporators or trustees met and organized under the name of the Florida Agricultural College, and the Treasurer made a demand upon the Treasurer of the Florida State Agricultural College for the property belonging to that institution. This demand the Treasurer of the Florida State Agricultural College refused to comply with, as the trustees declined to accept the amendment to their charter.

At the June term, A. D. 1877, the Attorney-General filed an information in the nature of a *quo warranto,* alleging that Peter Knowles, Robert Meacham, John Varnum, Frederick Hill, Thomas W. Osborn and N. H. Moragne and B. F. Oliveros had, without authority or warrant of law, for the period of fifty days or more past, exercised, and were still exercising, without authority or warrant of law, the franchises, privileges and liberties of a body corporate, by and under the name of *The Florida State Agricultural College,* and under such name had used and exercised without warrant of law, and were, without warrant of law, exercising the general powers of a body corporate, for the purpose of teaching such branches of learning as are related to agriculture and the mechanical arts, military tactics and other scientific and classical studies, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life, including the power to use a corporate seal, to build and construct college buildings, to contract and be contracted with, sue and be sued, and to receive donations and make purchases of lands, and sell and convey the same; and praying due process of law against them, to answer to the State by what warrant or authority they claim to exercise such franchises, liberties and powers.

The respondents answered, admitting that they had exercised, and were still exercising,the franchises,privileges and liberties of a body politic, by and under the name of the Florida State Agricultural College, in the manner and for the purposes set forth in the information, but denying that they ever have, or that they then exercised the same *without warrant of law*, and alleging that the Florida State Agricultural College was established by an act of the Legislature of Florida, entitled "An act to Establish the Florida Agricultural College," approved February 18, 1870, being Chapter 1766 of Laws of Florida,which said act was amended by an act entitled "An act Supplementary to Chapter 1766, of the Session Laws of A. D. 1870, being an act to Establish the Florida Agricultural College," approved February 17, 1872, being Chapter 1905, Laws of Florida; that by the said acts Wm.D.Bloxham, Oliver Bronson, Chandler H. Smith, Josiah T. Walls, Robert Meacham, John Varnum, J. S. Adams, Peter Knowles and the Superintendent of Public Instruction (by virtue of his office as such), their associates and successors, were created a body politic by the name of the Florida State Agricultural College, for the purposes set out in the information; that the said persons were thereby constituted a Board of Trustees, and invested with full power to manage and control the said college, and the property belonging thereto, in the manner and subject to the restrictions set forth in the said acts, and that in case any vacancy or vacancies should occur in the said Board of Trustees, the remaining trustees were authorized and empowered to fill such vacancy or vacancies, subject to the approval and confirmation of the Supreme Court of the State of Florida; and that the said corporators and trustees hereinbefore named, or a majority of them, in accordance with the provisions of the said acts, did, on or about the 20th day of March, 1872, meet at the office of the said Superintendent of Public Instruction, in the city of Tallahassee, and accept

the said charter of incorporation, by proceeding to organize under the said acts by the election of such officers, committees and agents as the said acts of incorporation required; and that they did, then and there, and that they and their successors have,to the present time,continued to take charge and control of the said college, and of its property, and to faithfully perform all the duties imposed upon them by the said acts of incorporation; and that on or about the 8th day of March, 1875, two of the said trustees, to-wit: Bloxham and Walls, did resign their offices as trustees of the said college, and thereupon two of the defendants, to-wit: N. H. Moragne and Frederick Hill, were elected by the said Board of Trustees to fill the said vacancies; that said elections were approved and confirmed by the said Judges of the Supreme Court and accepted by the said Moragne and Hill; and that afterwards two other of the said trustees, to-wit: Adams and Bronson, having died on or about the 28th day of December, 1876, two other of these defendants, to-wit: Thomas W. Osborn and B. F. Oliveros, were duly elected by the Board of Trustees to fill the said vacancies, and said elections were also approved and confirmed by the said Judges of the Supreme Court and accepted by the said Osborn and Oliveros; and that by virtue of the said acts of incorporation, and of the several elections to fill vacancies, as before specified, the defendants, together with Chandler H. Smith aforesaid and the Superintendent of Public Instruction (by virtue of his office), now constitute the Board of Trustees of the Florida State Agricultural College, and have full legal authority to exercise all the franchises of a body corporate conferred by the said acts of incorporation, to be exercised under the name, and in the manner and for the purposes in the said acts specified.

The Attorney-General filed a replication denying that *The Florida State Agricultural College* was established by Chapter 1766, as alleged in said answer, but that it was by the

act approved *February* 17, 1872, Chapter 1905, referred to in said answer, and no other law of the State of Florida, that said Bloxham, Bronson, Smith, Walls, Meacham, Varnum, Adams and Knowles and the Superintendent of Public Instruction, by virtue of his office as such, their associates and successors, were created a body politic, in the name of *The Florida State Agricultural College,* or constituted a Board of Trustees, as alleged in said answer, and that it was not until the enactment and approval of said Chapter 1905 that the said persons were created such body politic and constituted such Board of Trustees; and alleging that the Legislature of the State of Florida, at its session begun and held in the year A. D. 1877, passed an act entitled "An act in Relation to *The Florida Agricultural College,*" and that such act was approved by the Governor of Florida on the 7th day of March, 1877, being Chapter 3045, Laws of Florida, and then became a law of said State; that by the first section of said act, the *second section* of Chapter 1905 of the Laws of Florida, by which section it was that said Bloxham, Bronson, Smith, Walls and others and their successors were created said body,to-wit: *The Florida StateAgricultural College,* was amended so as to be and read as follows: "The Superintendent of Public Instruction and the Treasurer of the State of Florida, by virtue of their offices as such, and J. Wofford Tucker, David S. Walker, J. H. Roper, James M. Baker, C. H. Smith, F. Branch, W. D. Barnes, their successors, are hereby constituted a body corporate and politic, by the name of the Florida Agricultural College, and are intrusted with the general powers of a corporation, for the benefit of causing to be taught such branches of learning pertaining to agriculture and the mechanical arts, military tactics, and other scientific and classical studies, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life; and said corpora-

tion shall have perpetual succession, as is provided in the original act incorporating said college, and the right to use a corporate seal." That by the second section of said Chapter 3045 the third section of said Chapter 1905 was amended so as to read and be as follows: "The said Superintendent of Public Instruction and the said State Treasurer shall, by virtue of their offices as such, be president and treasurer of said board of trustees of said college, and the said board shall elect a vice-president, secretary and executive committee, which committee shall consist of five members. Said executive committee is empowered to act in behalf and under direction of the board between the regular meetings of the same and determine all the matters relating to officers or committees, and make all needful rules and regulations for the management of the affairs of the board;" that by the third section of said Chapter 3045, of the Laws of Florida, the treasurer of said board of trustees therein appointed is authorized, and it is made his duty to receive, and, if necessary, demand and send for in his own name, as treasurer, all property and debts belonging to said board; and by the fourth section of said act last named, the board of trustees, therein provided for, are given powers to remove the Agricultural College located at Eau Gallie, on Indian river, in Brevard county, to any point that, in their judgment, would be for the best interests of the State of Florida, such point to be easily accessible and as near the centre of the State as practicable; and that on or about the 11th day of May, A. D. 1877, the corporators named in said first section of said Chapter 3045, or a majority of them, did, in accordance with the provisions of said act, meet and then and there accept said charter of incorporation, with which they were created by said last named act, for the purposes and with the powers provided and set forth in said Chapters 1766, 1905 and 3045, of the Laws of Florida, as the same and each of them stood for force and effect on said 11th day

of May, A. D. 1877, and now stand, and did proceed to organize, under said acts, by the election of such officers and committees as said acts required, and then and there and thereby became, and have ever since been and still are such body politic and corporate, under the name of *The Florida Agricultural College;* and the Board of Trustees of said college, the same being the body politic and corporate and Board of Trustees thereof provided and contemplated by said Chapters 1766, 1905 and 3045, according to the force and effect of the same, from and since the approval of said last named law, on the 7th day of March, A. D. 1877, with *full* and *exclusive power to use, enjoy* and exercise all and singular the powers and franchises provided by said Laws of Florida, under the name of *The Florida Agricultural College;* and that by force and effect of said Chapter 3045, or by the force and effect of said act and the acceptance by said corporators or persons named in said first section of said act of said charter, provided and constituted by said Chapters 1766, 1905 and 3045, under the name of *The Florida Agricultural College,* and the election of such officers and committees, the franchises and privileges, rights and liberties granted to said W. D. Bloxham and others aforesaid, their associates and successors; and the right of being a body politic and corporate, under the name of *The Florida State Agricultural Colleye,* were taken away from the respondents; and that by the force and effect of said Chapter 3045, and the acceptance by said corporators named therein of said charter, provided by said Chapters 1766, 1905 and 3045, under the name of *The Florida Agricultural College,* and the election of such officers and committees aforesaid, the said corporators or persons named in said first section of said act, approved March 7, 1877, became a body corporate, under the name of *The Florida Agricultural College,* invested with exclusive right to exercise all the privileges, liberties and franchises provided or created in or by said

Chapters 1766, 1905 and 3045; and that the respondents have, since the 7th day of March, A. D. 1877, the day of the approval of said Chapter 3045, exercised, without warrant of law, and usurped the liberties, franchises and privileges, as charged in said information.

Respondents then filed a rejoinder, alleging that notwithstanding anything to the contrary alleged in the said replication, the said Florida State Agricultural College was established by an act of the Legislature of the State of Florida, entitled "An act to establish the Florida Agricultural College," approved February 18, 1870, *as amended* by an act entitled "An act supplementary to Chapter 1766 of the session laws of A. D. 1870, being "An act to establish the Florida Agricultural College," approved February 17, 1872; and that notwithstanding Chapter 3045, approved March 7, 1877, or the acceptance of the said act by the corporators or persons named in the first section thereof, the franchises, liberties and privileges of the said respondents, and their right of being a body politic under the name of *The Florida State Agricultural College,* granted to them by Chapters 1766 and 1905 aforesaid, were not taken away from the respondents; and that the said corporators or persons named in the said first section of Chapter 3045, did not become thereby invested with the exclusive right, or with any right whatever, to exercise the privileges, liberties and franchises provided or created in or by the said Chapters 1766 and 1905; and that said Chapter 3045 has not and never had the force and effect of a law of the statute of the State of Florida, and did not, in any manner or form, operate to alter or amend the said Chapters 1766 and 1905, of the Laws of Florida, or to deprive the said respondents of any powers or franchises belonging to or enjoyed by the said respondents by virtue of Chapter 1766 and 1905, or confer any of said powers and franchises, or any other powers and franchises upon the said corporators or persons

named in the said first section of Chapter 3045, *because* Chapter 3045 does not comply with the requirements of the Constitution of the State of Florida in this, *that the subject of the said act is not briefly expressed in the title of the said act;* and, furthermore, in that the acts undertaken to be amended or revised by the said act, (to-wit: Chaps. 1766 and 1905,) *were not thereby re-enacted as amended or revised* and *published at length,* but were amended or revised without such re-enactment and re-publication, *and by reference only to the title of one only of said acts;* and because that the said Chapter 3045 has not and never had the force and effect of a law of the State of Florida, *because it is in violation of the Constitution of the United States in this, that it takes away vested rights acquired by the said respondents under and by* virtue of the said Chapters 1766 and 1905, and impairs the obligation of the contract created by the said acts between the State of Florida and respondents; and because that the said Chapter 3045 is in violation of the Constitution of the United States, in this, that it impairs the obligation of contracts made in pursuance of the said Chapters 1766 and 1905 between the said Florida State Agricultural College, or the trustees thereof, and divers and sundry persons dealing and contracting with the said trustees under and by virtue of the said acts; and because in passing the said act the Legislature of the State of Florida exceeded its powers, in this, that the said Legislature could lawfully exercise no control over the said Florida State Agricultural College, or over the property belonging thereto, except such as may have been expressly reserved in the charter of said college as contained in the said Chapters 1766 and 1905; because the funds, lands, and other property belonging to the said college and in the custody and under the control of the respondents was granted directly to the trustees of the said college by the Congress of the United States or by private individuals in trust for the pur-

poses specified in the said charter, and was not granted by the State of Florida, and is not now and never was in any manner or form the property of the State of Florida, or subject to its custody or control.

The Attorney-General then filed a surrejoinder denying that any of the funds or lands, or other property, in the custody of respondents was granted directly to the trustees of said college, as alleged in said rejoinder, by the Congress of the United States, or by private individuals, in trust for the purposes specified in said charter, and not to the State of Florida; and alleging that said property, and funds, revenues and lands in the custody of respondents, are the property of the State of Florida, and contended that even if any property was granted directly to said college by private individuals or the United States for the purpose of said college, that nevertheless the respondents, *without warrant of law*, exercised the liberties, franchises and privileges.

The cause was heard at the January Term, A. D. 1878.

The Attorney-General for the State.

It is contended by the respondents that the act entitled "An act in relation to the Agricultural College," approved March 7th, 1877, being Chapter 3045 of Laws of Florida, is of no effect, because it does not comply with the 14th section of the 4th Article of the Constitution of 1868, which is in the following languge, to wit: "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title, and no law shall be amended or revised by reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length."

The first ground of objection is: "That the subject of

the said act shall be briefly expressed in the title of said act."

The second ground of objection is: "That the acts undertaken to be amended or revised by said act, to wit: The act entitled 'An act to establish the Florida Agricultural College,' approved February 18th, 1870, and the act entitled 'An act supplementary to Chapter 1766 of the session laws of Florida, 1870, being an act to establish the Agricultural College,' approved February 17th, 1872, were not thereby re-enacted as amended or revised, and published at length, but were amended or revised without such re-enactment and republication and by reference only to the title of one only of such acts."

We address ourselves to the first objection, to wit: "That the subject of the act is not briefly expressed in the title of said act."

The first inquiry is, what is the "subject of an act," within the meaning of the constitutional provision? The second is the extent to which this subject must be elaborated in the title; and the third is the limit or license of discretion which the courts accord to the Legislature in determining for themselves what is a sufficient expression of the subject of the act in the title.

I. What is the subject of this act? Common sense has some play in this matter. The title is "An act in relation to the Florida Agricultural College." The mention of the term Florida Agricultural College leads the mind of even those who are the least informed, with most accurate promptness, to the only institution and the only property which, in the history of the legislation of this State, has been designated by such terms. Every mind concludes at once that it refers to the organization to which the State delegated the duty of appropriating the land or land scrip granted by the United States to the State of Florida to the purpose of such grant, to wit: an Agricultural College.

The subject of the act is the property of every kind, including the buildings erected at Eau Gallie as well as the other property of the organization, and the organization itself. The most careful reading of the act discloses that there is nothing in it that does not relate to that college, its properties, organization or management; and that everything in it appertains to the college suggested by the title.

It is true that in Chapter 1905 of the Laws of Florida the corporators are constituted a body corporate and politic by the name of the *Florida State Agricultural College,* but it is equally true that by Chapter 1766 of the Laws of Florida (the original act) the college is established as the *Florida Agricultural College,* (sec. 1) and it is unquestionable that the use of either designation brings to the mind of every intelligent man in Florida the same subject.

There is nothing in either of the three acts in question which does not relate to the same subject.

In the case of Morton, Bliss & Co. vs. Comptroller General, (4 S. C., 442,) the matter of the subject of an act is discussed. Whether we consider such subject to be either a "right, obligation, or power created, modified, or destroyed, for the purpose of obtaining some end, either of public or private advantage, which constitutes the object of the statute," the right, obligation, or power created, modified, or destroyed by the statute of 1877 in question, is fully expressed in the title.

Such constitutional provisions as the one in question are of comparatively recent date, but have been very fully adjudicated by the several Supreme Courts of many States of our Union.

We address ourselves to the first objection, to wit: "That the subject of the act was not briefly expressed in the title of said act."

We cite the following authorities as showing that in so far as the expression of the subject of the act in the

title is concerned, the purpose of the constitutional provision was to prevent legislators from being misled, taken unawares, or deceived as to the real purpose of any action they might be called upon to take in their official capacities, and we respectfully submit that in the light of these authorities the title of the said act is amply sufficient to secure it from condemnation under the constitutional provision: Gibson vs. State, 16 Fla.; Thadlock vs. Ellis, 20 Texas, 792-3; People vs. Mahony, 13 Mich., 482; People vs. Pritchard, 21 Mich., 236; State vs. McCrackin, 42 Texas, 383; Collins vs. Henderson, 11 Bush, Ky., 75; Ramon vs. Mathews, 8 Heiskell, 504-5; Division Howard Co., 15 Kan., 194, 214, 215; State Line & I. I. Cos., Appeal, 77 Penn. St., 429; People vs. State In. Co., 19 Mich., 392; Harrington vs. Ware, 23 Mich., 385; Litchfield vs. Vernon, 41 N. Y., 123; State vs. Town of Union, 33 N. J., (Law) 351; Lead vs. Lead, 30 Ind., 171; Shields vs. Barnett, 8 W. Va., 74; La Font vs. Dufroe, 9 La. An., 350.

As to the limit or license allowed to the Legislature, as to what should be expressed in the title, we refer to the following authorities: Dugan vs. Morrow, 2 Vroom, 136; Brewster vs. Syracuse, 19 N. Y., 116; State vs. Town of Union, 4 Vroom, 354.

As to the second ground of objection, we submit that there has been no express amendment or revision of either of the acts prior to 1877 as acts, but that the amendment, if an express amendment, is the amendment of particular sections of Chapter 1905 as contra-distinquished from an amendment or revision of either of said acts as acts. That if there is any amendment of any of the sections of said acts, other than those expressly amended, the amendment is by implication, and that there is nothing in our Constitution which prohibits the amendment of a section or sections as contra-distinguished from a whole act, or the repeal of a

section or a whole act by implication. State vs. Draper, 47 Mo., 29; People vs. Wands, 23 Mich., 385.

David S. Walker, Sr., on the same side.

In the case of the Trustees of Dartmouth College vs. Woodward, reported in 4 Wheaton, 526, the Legislature of New Hampshire changed the charter of the college which the British Crown had granted the trustees in 1769, by changing the trustees and in other respects. The defendant, Woodward, was in possession of some of the property of the college, and the new trustees brought suit to recover it. He resisted the suit on the ground that the act changing the trustees was unconstitutional.

Chief-Justice Marshall, in delivering his opinion in this case, said: "If the act of incorporation was a grant of political power—if it created a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire as a government be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its powers imposed by the Constitution of the United States;" and again, "we are informed by the case of Philips vs. Barry, 1 Lord Raymond, 5, S. C., 2 T. R., 346, which contains all the doctrines of corporations connected with this point, that there are two kinds of corporations aggregate, viz: such as are for public government, and such as are for private charity. The first are those for the government of towns, cities or the like, and, being for public advantage, are to be governed according to the law of the land, the validity and justice of their private laws and constitution, are examinable in the King's Courts. Of these there are no particular founders, and consequently no particular visitors. There are no pat-

rons of these corporations; but private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who create them, and are to be visited by them and their heirs as they may appoint. The only rules for the government of the private corporations are the laws and constitutions assigned by the founders. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity, and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it."

Justice Story, in the same case, also explains the difference between public and private corporations. He says: "Another division of corporations is into public and private. Public corporations are generally esteemed such, or exist for public purposes only, such as towns, cities, parishes and counties, and in many respects they are so, though they involve some private interest; but strictly speaking, public corporations are such only as are founded by the government for public purposes, when the whole interest belongs to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own use, whose stock is owned exclusively by the government, is, in the strictest sense, a public corporation; so a hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is created by the government and its objects and operations partake of a public nature."

A little further on, in the same opinion, Judge Story says: "When the corporation is said at the bar to be public,

it is not merely meant that the whole people may be the proper objects of the bounty, but that the government has the sole right, as trustee of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now such an authority does not exist, except when the corporation is, in the strictest sense, public."

It is plain from the foregoing extracts from the opinions of Judges Marshall and Story, that the Legislature has the constitutional power to change the trustees, and in other respects to alter the charters of public corporations, but not of private ones.

The only question, therefore, is whether the Florida Agricultural College is a public or a private corporation? It is clear from the extracts which I have read that if the funds with which the college was established are public, then the college is a public corporation, if not it is a private corporation.

The only question left is: Were the funds with which this college was founded public or private?

The act of incorporation of 1870 shows upon its face that all the funds with which the college was endowed were public—the property of the State through the gift of the United States.

Sec. 7 of said act reads thus: "Sec. 7. Said trustees are hereby authorized to claim and receive from the Secretary of the Interior the Agricultural Land Scrip to which this State is entitled, by act of Congress of July 2, 1862, and acts supplemental thereto. Said scrip is hereby transferred and assigned to and vested in the Trustees of the Florida Agricultural College and their successors and assigns forever.

The scrip so granted by Congress to the State, and by the State to the College, is expressly recognized in sections 8, 9, 12 and 17 of said act as "the fund" or "funds" of said

college, and no mention is made in the act of any other "fund or funds" whatever. That the whole fund of the college at the time of its incorporation consisted of said grant, is an historical fact too well authenticated to need argument.

The funds of the college being public property, it follows, in the language of Chief Justice Marshall, that the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

The law thus laid down in the Dortmouth College case has been received and acted on by the courts of Alabama, Arkansas and Kentucky, and perhaps other States, where banks, colleges and other institutions, whose funds were furnished exclusively by the State, have been adjudged to be public institutions, whose charters are subject to be amended and altered at the will of the Legislature. See 5 Stewart and Porter.

The case of McCulloch vs. the United States was decided in 1820, 4 Wheaton, 316, and Osborn vs. The Bank in 1824, 9 Wheaton, 738. These cases hold that the bank of the United States was a public corporation, created for public and national purposes. The court treated the United States bank as one of the institutions of the government.

In Osborn vs. The Bank of the United States, C. J. Marshall said: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation created for national purposes." * * * "It was not created for its own sake, or for private purposes." 9 Wheaton, Con. R., 770.

The whole opinion of the court is founded on the idea that the bank in McCulloch vs. Maryland is an institution which is necessary and proper for carrying into effect the powers vested in the government of the United States. "It

is not an instrument which the government found ready made and supposed to be adapted to its purposes, but one which was created in the form in which it now appears for national purposes only. It is undoubtedly capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage."

A writer in the Law Review says: "The opinion of Taney in the bridge case was, as Story felt, a great departure from the principles underlying the opinion of Marshall in Fletcher vs. Peck and in the college case. The opinion in Munn vs. The People is, in effect, a far greater one."

The court will see from the foregoing opinions that the Supreme Court of the United States has largely modified its rulings in the college case, and now holds a good many institutions to be public and subject to legislative control, which could not be so held under the strict rulings of that case. But admitting all the rulings in the Dartmouth College case to be in full force, I have shown that the Florida Agricultural College is a public corporation, whose trustees may be removed by the Legislature. This was the view of the law taken by the Legislature, when, in 1872, they amended the charter by changing the trustees, and this was the view taken in 1877, when the trustees were again changed.

To quote the language of Judge Washington: "These trustees have no interest, no privileges and immunities which are violated by such interference. * * They accepted the charter for the public benefit alone, and there should seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure. * * * All those powers, rights and privileges flow from the property of the founder in the funds assigned for the support of the charity. * * * * The endower is the *perficient* founder to whom of right belong

all the powers and privileges which have been described." By looking at the act of Congress of July 2, 1862, the court will see clearly that Congress intended that this college should be a State or public, and not a private institution. The first and second sections give to the State the land scrip on which the college is to be founded. The third section provides that the State shall pay all expenses in the management of the monies received from the sale of the scrip. The fourth section provides that the State Legislature shall prescribe the manner in which the prescribed studies shall be conducted. The fifth section provides that the Legislature alone can authorize the expenditure of money in the purchase of sites for experimental farms; that the State "shall be bound to pay the United States the amount received for any lands previously sold, &c.; that the State shall make an annual report to the Secretary of the Interior of the progress of the college," including State, industrial and economical statistics. By the eighth section the Governor of the State is required to report annually to Congress the sales of the land scrip and the disposition made of the proceeds.

Under the act of Congress the Legislature could not have made this a private college, even if it had tried to do so. It would have been eminently improper for the State to place this magnificent fund, given to her by Congress, under the control of irresponsible trustees, whom she could not remove, even though she should see that they were wasting the fund. Such an act by her would have been a just cause for the revocation of the grant by Congress. But the State of Florida intended no such act of folly and injustice.

By the seventeenth section of the act of 1870 the Comptroller of the State is authorized to make examination from time to time, as he may see fit, into the actions and doings of said trustees, to the end that he may ascertain whether the proceeds committed to them have been managed accord-

ing to the letter and intent of this act, and the trustees are required to report to the Comptroller annually.

By sectioh 18 of the act of 1870 the trustees are required to report to the State Superintendent of Public Instruction annually all their actions and doings, and said Superintendent is required to lay said report of the Trustees before "the Legislature at the beginning of each regular session."

But why should the report of the trustees be laid before the Legislature, along with the reports of the examinations of the State Comptroller, if the Legislature has surrendered all its power to the trustees, and were to be mere passive spectators of their actions? Evidently it was the intention of the Legislature in thus providing for keeping itself constantly advised of the conduct of the trustees, to keep itself in position to correct abuses by the removal of trustees in proper cases.

The twentieth section of the act of 1870 provides that "the Judges of the Supreme Court of the State shall constitute an examining committee, with power to investigate the affairs of the corporation, and to appoint proxies in their stead."

In private corporations the "*incipiens fundator*" alone appoints visitors and examiners to look into the affairs of his corporation and report to him, in order that he may correct abuses No one else has a right to intermeddle with his corporation; but in a public corporation the State appoints the visitors, such as the Comptroller and the Justices of the Supreme Court in this case, and they report, not to the Trustees, but to the State, the *incipiens fundator* and *percipiens fundator* of this college, in order that the State. through its Legislature, may correct abuses by removing the trustees or amending the charter.

E. M. Cheney and *John A. Henderson* for Respondents.

The respondents claim that the Florida State Agricultural College was established by the act approved February 18, 1870, as amended by the act approved February 17, 1872. The Attorney-General denies this, and claims that it was established by the latter act alone. The act approved February 17, 1872, did not, of itself, provide for the establishment of a college. It was simply supplementary to and amendatory of the act approved February 18, 1870, which provided all the details for the organization and management of the college, and it so expressly stated both in the title and in the body of the act. The first act did not take effect until after the passage of the second act, because the corporators therein named failed to acept it. The supplemental act provided new corporators in place of those who declined to act; changed the name of the college from "The Florida Agricultural College" to "The Florida State Agricultural College," and made several other alterations. The two acts then became one act, and, together, formed the charter of the college, which the corporators, named in the supplemental act, accepted, and under which they organized.

The Act approved March 7, 1877, does not comply with the Requirements of the Constitution of the State.

Section 14 of Article IV., of the Constitution of Florida, provides as follows:

"SECTION 14. Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title, and no law shall be amended or revised by reference to its title only; but in such case the act as revised, or section as amended, shall be re-enacted and published at length."

The title of the act approved March 7, 1877, is "An act

in relation to the Florida Agricultural College." The subject of the act is not briefly expressed—is not expressed at all—in this title. An act creating a college cannot properly be entitled an act in relation to that college, for the term implies the pre-existence of the thing to which the act relates. There was no institution in existence by the name of "The Florida Agricultural College," in relation to which acts could be passed. The act really embraces several subjects, none of which are expressed in its title. One subject is, professedly, the amendment of certain sections of the act approved February 17, 1872; but in reality is the creation of a new corporation under a new name. Another subject is the transfer of the property belonging to the Florida State Agricultural College to this new corporation. Another subject is the location of the Florida State Agricultural College.

Under the common law, the title of an act, or the preamble to it, are not, strictly speaking, parts of the act; (1 Kent Com., 509,) but where the constitntion provides that the subject shall be expressed in the title, the title becomes a part of the act. The provision is mandatory, not simply directory; and so much of every statute as contains matter different from what is expressed in the title is void. The Constitution has made the title the exclusive index to the legislative intent as to what shall have operation. Mayor of Savannah vs. State, 4 Geo., 27; 12 Geo., 36; Cooley on Const. Lim., 81, 82, 141, 149; Sun Mut. Ins. Co. vs. Mayor of N. Y., 8 N. Y., 254; Connor vs. Mayor of N. Y., 5 N. Y., 293; Davis vs. State, 7 Md., 151; State vs. Union, 33 N. J., 354; Hall vs. Bunte, 20 Ind., 304.

The matter of the whole act approved March 7, 1877, is different from what is expressed in its title, and therefore the whole act is void.

The revision or amendment of a law cannot be made by reference to its title only, but the act as revised, or section

as amended, must be re-enacted and published at length. This provision of the Constitution is grossly violated in the act approved March 7, 1877. This act undertakes to amend the act approved February 17, 1872, by reference to its title only. Two sections of this act (which sections were simply amendments to the act of 1870) were re-enacted and published at length, but it then proceeds to add three new sections without specifying what law, if any, these sections were intended to amend. These sections, if they have any operation at all, operate to amend or alter various provisions in the act of February 18, 1870, (which is not referred to, even by its title only;) section 4, for instance, being a virtual amendment or revision of section 7 of the act of 1870, and also of section 4 of the act of 1872. The act of March 7, 1877, is not a complete act in itself; for it has no force or meaning, except as taken in connection with and made a part of both the act of February 18, 1870, and the supplementary act of February 17, 1872. It is not, properly, an amendment to the act of 1872, for that act is only an amendment to the act of 1870, but it is in substance a revision of the act of 1870, as amended by the act of 1872, and these acts as revised by the act of 1877, should have been re-enacted and published at length.

The provision in the Constitution prescribing how an act shall be amended or revised is mandatory, and any departure from the prescribed mode is fatal to the validity of the amendment or revision. Cooley's Const. Lim., 81, 82; 12 Geo., 36; State vs. Ingersoll, 17 Wis., 631; Heirs of Duverge vs. Salter, 5 La. An., 94; Rogers vs. State, 6 Ind., 31; State vs. Draper, 47 Mo., 288; Weaver vs. Lapsley, 43 Ala., 224; 28 Ind., 382.

The Act approved March 7, 1877, is in Violation of the Constitution of the State and of the United States.

Section 10 of Article I. of the Constitution of the United

States provides that no State shall pass any "*ex post facto* law, or law impairing the obligation of contracts." Section 16, Declaration of Rights, Const. of Fla.

The act approved March 7, 1877, impairs the obligation of contracts. 10 Fla., 130.

If the Florida State Agricultural College is a public corporation, then the charter granted to it by the State does not constitute a contract between the corporators and the State, and the Legislature has full control over it. If, however, the college is a private corporation, even though created for a public purpose, its charter constitutes a contract, and is protected from violation or alteration, without its consent, by the Constitution of the United States. The respondents claim that the Florida State Agricultural College is a private corporation.

Public corporations are thus defined:

"Public corporations are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers to be exercised for local purposes connected with the public good, and such powers are subject to the control of the Legislature of the State." 2 Kent's Com., 309.

"Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public politic purposes only, such as towns, cities, parishes, and counties." Story, J., Dartmouth College vs. Woodward, 4 Wheat., 518.

"When then the argument assumes that because the charity is public the corporation is public, it manifestly confounds the popular with the strictly legal sense of the terms. * * When the corporation is said at the bar to be public, it is not merely meant that the whole community may be proper objects of its bounty; but that the government have the whole right, as trustees of the public interest, to regulate, control, and direct its funds and franchises at

its own good will and pleasure. Now, such an authority does not exist in the government except where the corporation is, in its strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself." Ibid.

"If the act of incorporation be a grant of political power; if it creates a civil institution to be employed in the administration of the government; or, if the funds of the college be public property; or, if the State of New Hampshire, as a government, be alone interested in tis transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States." Ibid. Opinion of Marshall, C. J.

None of these definitions will apply to the Florida State Agricultural College.

It is not a county, town, village, city, or parish.

Its charter contains no grant of political power.

It is not in any manner employed in the administration of the government.

Its funds are not public property, for they were donated by the United States, and by individuals, to be used for a particular purpose in a particular manner.

No portion of its interests and franchises are either directly or indirectly the property or domain of the State.

A private eleemosynary corporation is defined as follows:

"An eleemosynary corporation is a private charity constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick and impotent persons, and colleges and academies for the promotion of learning and piety, and endowed with property by public and private donations." 2 Kent's Com., 308, and references; Dartmouth College vs. Woodward, 4 Wheat., 518; 9 Gill & John., 365.

"The authorities are full to prove that a college is a private charity as well as a hospital, and that there is, in reality, no difference between them except in degree; but they are within the same reason and both eleemosynary." Dartmouth College vs. Woodward, 4 Wheat.

"A corporation is private as distinguished from public, unless the whole interest belongs to the government, and it be created for the administration of political or municipal powers." Rundle vs. Delaware and Raritan Canal, 1 Wall., Jr., 275.

"A private eleemosynary corporation is an institution endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter, and where the donors have stipulated for the future disposition and management of these funds in the manner prescribed by them." Marshall, C. J., in Dartmouth College vs. Woodward.

All of these definitions apply to the Florida State Agricultural College.

It is an eleemosynary corporation, constituted for the distribution of the free alms and bounty of the founder, in such manner as that founder has directed.

It is a college for the promotion of learning, and is endowed with property by public and private donations.

The whole interest does not belong to the government, and it was not created for the administration of political or municipal power.

Its funds were bestowed by individuals (for the United States Government, so far as the State is concerned, is an individual,) on the strength of the charter, and the donors stipulated for the future disposition and management of these funds in a manner prescribed by themselves.

The fact that the Florida State Agricultural College was endowed originally by the United States Government from the public lands, does not affect the character of the corpora-

tion. A public foundation does not make the corporation public; nor would it have done so, even though the endowment had been made by the State itself from the public lands or funds belonging to the State. This point is definitely settled by judicial decisions. 3 Geo., 283; Dart. vs. Houston, 22 Geo., 530; Allen vs. McLean, 1 Sumner, 276; 14 Allen, 532; 5 Allen, 66; 57 Maine, 527; 2 Perry on Trusts, 742; Dartmouth College vs. Woodward, 4 Wheat., 518; St. Johns College vs. State, 15 Md., 330; Brown vs. Hummel, 6 Penn. St., 86; State vs. Adams, 4 Mo., 570. Nor can the trustees be changed. Harvard College vs. Soc. for promotion Theo.Ed., 3 Gray,280; Attorney-General vs. Hartley, 2 J. & W., 382; Attorney-General vs. Mansfield, 2 Russ., 520; Stone vs. Framingham, 109 Mass., 303; Attorney-General vs. College of Wm. and Mary, 1 Vesey, Jr., 243; 1 Black. Com., 469-482; 1 Kyd. Corp., 25; Attorney-General vs. Whorwood, 1 Ves., 534; St.Johns College vs. Todington, 1 Bl. Rep., 84; Philips vs. Bury, 1 Ld. Raym., 5; Allen vs. McLean, 1 Sumner, 276; Dartmouth College vs. Woodward, 4 Wheat., 518.

The Florida State Agricultural College being a private eleemosynary corporation, the charter granted to it by the Legislature of Florida by the act of February 18, 1870, as amended by the act of February 17, 1872, is a contract within that clause of the Constitution of the United States which declares that no State shall make any law impairing the obligation of contracts, and any subsequent act of the Legislature altering this charter without the consent of the corporation, is an act impairing the obligation of the charter and is unconstitutional and void.

"A grant of incorporation is, in fact, in the nature of a contract between the government and its subjects, the latter of whom undertakes in consideration of the privileges bestowed, to do what the government is interested in having done." Angell & Ames on Corp., 47; King vs. Passa-

more, 3 T. R., 246; 4 Peters, 562; Fletcher vs. Peck, 6 Cranch, 37; Cooley Const. Lim. 279, n. 2. "A legislative grant is not revocable." 9 Cranch, 256; 75 L. R., 562; 1 Blk. Com., 471; 4 Wheat., 518; 1 Sumner, 276; 4 Wheat., 564.

But even if the Legislature had reserved the right to alter or amend the charter of the Florida State Agricultural College, this reservation would not have authorized it to change the trustees.

"A reservation in a charter for the Legislature to alter, repeal or amend, does not imply the power to change the vested rights acquired by the corporators under the charter, or to add new parties and managers without the consent of the corporators." 15 B. Munroe, (Ky.,) 340.

"In the charter of the college it is declared that the Legislature 'may grant further powers to, or alter, limit, annual or restrain any of the powers by this act vested in the said corporation as shall be judged necessary to promote the best interests of the college.' Under this clause the authority of the Legislature is confined to the enlarging, altering, annulling or restraining of the powers of the corporation, and does not extend to any intermeddling with its property, or extinction of its corporate existence." Allen vs. McLean, 1 Sumner, 276.

The obligation of the contract made between the trustees of the college and W. H. Gleason is also impaired by the act approved March 7, 1877. This contract was that Mr. Gleason should donate a large tract of land to the college, and in consideration of this donation, the college should be permanently located at Eau Gallie. The land was conveyed to the trustees, and the permanent location of the college was fixed by the trustees at Eau Gallie, where a college building was subsequently erected. The act of March 7, 1877, authorizes the trustees therein named to remove the college from Eau Gallie to some other place, thus utterly

ignoring and deliberately violating the contract made with Mr. Gleason. A law, then, which authorizes the removal of the college without the consent of the donor of these lands, is a law impairing the obligation of a contract, and is within the prohibition of the Constitution of the United States.

The Legislature, in Passing the Act of March 7, 1877 Exceeded its Power.

The Florida State Agricultural College is a private eleemosynary corporation, incorporated by the Legislature of Florida on the strength of an endowment promised by the United States Government. The endowment, though granted to the State in terms, was not intended for the use of the State, nor to be subject to the control of the State, for the manner in which it was to be invested, and the uses to which it was to be applied, were expressly stated in the grant. It was, by the terms of the grant, to be given to at least one Agricultural College, to be established by the State within a specified time. The State was made a trustee, (1 Perry on Trusts, 41,) and was to be held responsible for the faithful execution of the trust and the safe-keeping of the fund. A State can only execute a trust through officers or corporations created by the Legislature for that purpose, and the State, therefore, created this corporation to manage the fund and control the college. In granting the charter it might have reserved to itself the power to change the trustees, but it did not do so, and consequently the corporators named in the charter acquired a permanent right to their character as trustees, which could only be divested in the manner pointed out in the charter.

In point of fact, however, the State never became even a trustee; for, having failed to comply with the conditions of the grant, the United States refused to deliver to it the scrip,

and, without such delivery, the grant did not take effect. 1 Perry on Trusts, Sec. 100.

The Florida State Agricultural College being, then, an existing corporation, capable of taking and holding property for the purposes specified in its charter, Congress ignored the State and made a new grant, followed by actual delivery of the scrip to this college. The result is that the State is absolved from any responsibility relative to the fund, or from any obligation to keep it undiminished, and the college holds and manages the fund, subject only to the limitations and conditions prescribed in its charter, and not subject to any control on the part of the State.

The Constitution of Florida provides that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken without just compensation." Declaration of Rights, Sec. 8.

A corporation is a person, and the rights, privileges and franchises of a body corporate and politic are as much "property" as are real and personal estate. Blackstone, after enumerating other liberties and franchises, says: "It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession and do other corporate acts; and each individual member of such corporation is also said to have a franchise or liberty." 2 Black. Com., 37.

The property belonging to the college is also the property of the trustees. It is true they hold it in trust for certain purposes, but the legal estate is theirs, and this legal estate is as much an object of legal protection as any other estate. But whatever may be the title of the trustees, this property certainly is not the property of the State. It was given directly to the trustees by the United States Government and by individuals; it never was, either directly or indirectly, the property of the State, nor in its possession, nor subject

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embraced, so far as the State Legislature is concerned, in three acts. These acts, giving a condensed statement of their provisions, are as follows:

Chapter 1766, of the Laws of Florida, is an act to establish the Florida Agriclutural College. The first section of the act established the college. The second section announces its design and purpose. The third section constitutes certain persons a body corporate, by the name of the Trustees of the Florida Agricultural College, investing them with the general powers of a corporation, and with right to use a corporate seal. The fourth section gives the power of removal from office, as well as the power of filling vacancies in office. The 5th section provides for the election of an executive committee with named powers. The 6th provides for their compensation. The 7th, 8th and 9th relate to the agricultural land scrip, which the State is entitled to under the act of Congress of July 2, 1862, the investment of the proceeds of the sale thereof and application of the interest. The 10th provides for the location of the college. The 11th makes the expense incurred in procuring and selling the scrip a charge against the State. The 12th authorizes an investment of the money in State bonds. The 13th gives the trustees power to name a president of the college and professors, and for their compensation. The 14th provides for the faculty. The 15th prescribes their duties. The 16th provides that each county may send one student for each member of the Assembly. The 17th gives the Comptroller authority to examine the acts of the trustees, and makes it their duty to report to him. The 18th requires the trustees to report to the Superintendent of Public Instruction. The 19th authorizes the Legislature to add other departments of learning. The 20th provides that the Justices of the Supreme Court shall constitute an examining committee to inquire into the affairs of the college.

Chapter 1905, of the Laws of Florida, is "An act supple-

mentary to Chapter 1766 of the session laws of 1870, being an act to establish the Florida Agricultural College." The 1st section of this act repeals sections 3 and 5 of Chapter 1766. Section 3 of Chapter 1766 named the trustees and established them a body corporate, with right to use a corporate seal and have succession. Section 5 of that chapter provided for their first meeting, for the election of officers and an executive committee and fixed their powers. Sections 2 and 3 of the supplementary act are plainly in lieu of sections 3 and 5 of the first act thus repealed. These sections of the supplementary act named certain persons as corporators under the name of the "Florida State Agricultural College," giving them corporate powers and defining their duties and powers, and it is under *these sections* that respondents claim title. The necessary conclusion is, that the two sections, 2 and 3 of the supplementary act, were in lieu of sections 3 and 5 of the first act. Section 4 of the last act gives them power to construst college buildings, to sue and be sued, and to receive donations. Section 5 gives each State Senator the right to nominate a student, who shall be entitled to receive instruction at the college.

Chapter 3045, of the Laws of Florida, is "An act in relation to the Florida Agricultural College." The 1st section enacts that section 2 of "An act supplementary to Chapter 1766 of the session laws of 1870, being an act to establish the Florida Agricultural College," be amended so as to read as follows:

"The Superintendent of Public Instruction and the Treasurer of the State of Florida, by virtue of their offices as such, and J. Wofford Tucker, David S. Walker, J. H. Roper, James M. Baker, C. H. Smith, F. Branch, W. D. Barnes, their successors, are hereby constituted a body corporate and politic by the name of the 'Florida Agricultural College,' and are entrusted with the general powers of a corporation for the benefit of causing to be taught such

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the other sections are original and not revisory legislation in the sense of that word as used in the Constitution.

Every act containing different provisions upon a matter which has been already the subject of legislation cannot be called a revisory act. 40 Ala., 77; 41 Ala., 18; 13 Mich., 497.

The next general proposition as to this statute is that it impairs the obligation of a contract. The statue changes the trustees of this college. It substitutes the trustees named in the act of 1877 for those named in the act of 1872, as the act of 1872 substituted those named in it for those mentioned in the act of 1870. The ground upon which this view is based is that this is a private not a public corporation. The corporation is itself founded by the State through property derived from the government of the United States. These trustees are made by this legislation the agents of the State to collect and disburse property appropriated by the General Government to the State for a public purpose.

There is not and never was any private property in the trustees in the funds. They were derived from the government. The founder of this institution was the government of the State of Florida, and the property which constituted its basis was public moneys of the State of Florida derived by it from the government of the United States in trust for the establishment of an institution of this character.

It never was the purpose of the State of Florida to give these trustees any private right to this property. Throughout the whole legislation they are shown to be simple public agents to manage a public property. The only right they have to it is by the legislation of the State, and every section of these acts shows that it was founded by public funds and for a public purpose. 5 Stew. & Port., 23; 4 Wheat., 518.

It may be true that any legislation of the State appropri-

ating these funds to any other purpose than that public purpose named in the act of Congress, might have been in bad faith, but that is a matter which does not concern these trustees, nor does this fact change the nature of the institution.

It is insisted that the obligation of a contract with W. H. Gleason is impaired by the act of 1877, in that it directs a removal of the college. This question is entirely independent of the question raised in this case, which is the right of the trustees to hold and exercise a public trust against the provisions of a statute naming other persons trustees in their stead. Because they may have made a contract with some one else cannot extend their powers or rights.

The question whether a city or town has made a contract with A. B. or C. is entirely distinct from the question whether the Legislature may not change the affairs of a public municipal corporation.

What has been said disposes of the further objection, on the ground that these respondents are deprived of their property without due process of law.

Holding their franchises subject to legislative action, legislation depriving them of them is due process of law.

Judgment of ouster is awarded.

JOHN A. LORING, PLAINTIFF IN ERROR, VS. W. L. WITTICH, DEFENDANT IN ERROR.

1. In a suit commenced by summons, and in which an attachment is issued at the same time, a motion to dissolve the attachment will not prevent the plaintiff entering the defendant's default for not pleading.

2. Where a judgment by default for want of a plea is regularly taken, an application to set aside the judgment and allow the defendant to plead, is addressed to the sound discretion of the court.

3. After judgment by default, the court may allow the plaintiff to amend the record and proceedings, during the same term, but such amendment, unless it affects a substantial right of the defendant, does not give him a right to demand that the judgment be set aside.

Writ of error to the Circuit Court for Escambia county.

The defendant in error, Wittich, who was plaintiff in the court below, claimed to have sold goods amounting to $1,761.35 to the schooner William Fisher, of which John Loring and others were owners, and Loring was master. The bills not being paid, such plaintiff in the court below, on the 14th day of December, 1876, commenced suit in assumpsit by filing his *praecipe* for a summons *ad respondendum* against John A. Loring and eight other persons, describing them as partners under name of Schooner William Fisher. Whereupon a writ of summons *ad respondendum*, returnable to January rules, 1877, issued, which, as shown by the return, was executed by service on Loring. After such commencement of suit by *praecipe* and summons, and on the said 14th day of December, plaintiff below sued out ancillary attachment against the property of defendants in said suit.

On the 29th of December, 1876, Wittich filed his declaration in assumpsit, setting forth that said defendants being the owners, and said defendant Loring being the master of said schooner William Fisher, and said defendants being engaged with said schooner in trading between the port of Pensacola and sundry other ports, purchased from the plaintiffs the bill of goods attached to said declaration, and made part of said declaration, at the prices stated in said bill, amounting in the aggregate to $1,761.35, which they had often promised to but had failed and refused to pay. The declaration also contained common counts.

Afterwards, on the 11th of April, 1877, the defendants below filed a special appearance and motion to dissolve the said attachment upon the ground of insufficiency of affida-

vit for attachment, and upon the ground that affidavit was untrue. On the 4th day of June, 1877, default was entered against said alleged partners for want of appearance and plea, and upon proper proofs being made final judgment was, on the 6th day of June, entered for $1,828.63 against all of them, and ten days thereafter execution issued. Afterwards, on the 11th of June, said defendants filed, and noticed for hearing on the 14th of June, their motion as follows:

"The defendants move to set aside the default and judgment therein rendered in said case, and for cause alleged that there was a motion pending for the dissolution of the attachment in said case at the time of the entry of said default and judgment."

At the special June term of said court, and on the 26th day of June, (the above motion of 11th of June not having been heard) the said defendants brought so much of their motion to hearing, filed 11th of April, as sought to dissolve the attachment in said case for want of an allegation in plaintiff's affidavit that the debt was actually due; and the court, after argument, adjudged the affidavit insufficient, refused plaintiff's application to amend the affidavit in that particular, to which plaintiff below excepted, and ordered that the attachment issued in said case be dissolved. Thereupon the said defendant brought to a hearing their motion to set aside the default and judgment.

This motion the court denied, refusing to set aside said judgment and default entered as aforesaid for want of appearance and plea to the action by defendant, the court ruling that the said motion for the dissolution of the attachment in the case, and the special appearance entered for defendants in connection therewith, was insufficient to prevent the entry of said default and judgment.

Afterwards, on the 3d day of July, the defendants moved to set aside the said default and judgment against all the

defendants except John A. Loring, on the ground that no partnership existed between Loring and the other defendants, and because the defendants, other than Loring, were not served with process, nor had publication been made, and that they had not been residents within the limits of the State, but had always been residents of the State of Maine. This motion was granted by the court, and the said default and judgment as to all the defendants, except Loring, were vacated and set aside, to which order plaintiff below excepted.

Afterwards, on the 5th day of July, the plaintiff moved to amend the proceedings by striking out wherever it appears the description of defendants as partners and by inserting in the proceedings proper notification of non-service on the defendants other than John A. Loring, and by so amending the judgment that it may appear as entered against the party served, to wit: John A. Loring, with proper notification of non-service upon other defendants, the execution to be amended to make it conform to the amended proceedings and the rules of court and the laws applicable thereto. Which motion was allowed on the 11th day of July, 1877.

Loring has brought the case here by writ of error. The errors assigned are stated in the opinion.

Geo. P. Raney for Plaintiff in Error.

E. A. Perry for Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

The plaintiff in error, who was the defendant below, seeks to reverse the judgment upon three several grounds:

1. That the court erred in denying the motion to set aside the default and the judgment entered thereon.

The suit was commenced by *praecipe* and summons, and

an attachment was issued on the same day against Loring and several others who were described as partners.

The defendant Loring was served with the summons, and the other defendants being non-residents were not served, but all the defendants appeared specially, and moved to quash the attachment, which motion was granted; but meantime, for want of appearance and plea to the declaration, the defendant's default was duly entered and final judgment was rendered against all the defendants. Subsequently, however, at the same term, the judgment was vacated as to all the defendants not served with summons.

The default of Loring was regularly entered, as he had been served with summons and had failed to appear generally and plead. His excuse for this failure was that as he had made a motion to dismiss the attachment, he was advised, and supposed, that no default could be entered against him while that motion was pending. Of course he was mistaken in this. The dismissal of the attachment did not abate the suit, as it was commenced by summons duly served on Loring. Had he tendered a good plea to the merits, or filed an affidavit of merits and offered to go to trial at once upon a material issue, the court might well have set aside the default and permitted him to plead; but this was a matter to be addressed to the sound discretion of the court. (1 Tidd's Pr., 508; Graham's Pr., N. Y., 788; 3 Johns., 141, 245, 258, 449; 6 ib., 131; 1 Cai., 111, 118; 2 Cai., 30; 3 Cai., 95; 2 Str., 1,242; 2 Salk., 518; 2 W. Bl., 35.) Had there been any substantial irregularity in the entry of the default, it might be asked as a mattter of right that the default be set aside and the party be permitted to plead, but as the default was regular it could only be asked as an exercise of the discretion of the court. It has been quite uniformily held that as to orders resting in the discretion of the court, the parties cannot require their reversal by an appellate court.

2. The second ground of error is that the court "denied the motion to dismiss the cause for default in filing bill of particulars under Rule 14 and the 3d section of Chap. 1096, Laws of 1861."

It is not clear that there is any foundation for this allegation of error. With the declaration appears to have been filed a detailed account by items and prices of goods bought of plaintiff by defendant, which account is referred to in the declaration as the claim sued on. This is all that the statute or the rules require.

3. The third ground of error is the granting of a motion to amend the proceedings by striking out, wherever they occur in the process, pleadings and judgment, the words describing the defendants as partners, and noting the non-service upon the other defendants.

There is no substance in this objection. It can make no difference to the defendant Loring whether he is described as a partner or otherwise liable with the others. The judgment as to him was regular. Had he shown to the court below that he had a defence upon the merits to the action in its amended form, or that he was in any wise prejudiced by the allowance of the amendment, he might have some grounds of complaint. It is not apparent that he was injured, or in any way affected by it. He has nothing to complain of in this respect.

The argumentative suggestion of counsel, that the defendant Loring may have defences to the action in its amended condition, can have no weight, because he did not, when he had the opportunity, apply to the court for leave to file a plea. That he may have a defence is possible, but the probability is that if he had he would have informed the court of the fact, and in that case he would have been in a condition to demand a hearing.

The power of the court to allow the plaintiff to amend his proceedings is ample, under the provisions of the prac-

tice act of 1861, and the act secures to the defendant in such cases, "if duly applied for," every legal or equitable defence.

The common law rule that a record was not amendable, must be taken to mean that it was not amendable after the term, (Rex vs. Carlisle, 2 B. & A., 971,) for during the term the record is said to in *fieri*, and it is in the breast of the court to mould it as the justice of the case requires. See note to Robinson vs. Raley, 1 Smith's Leading Cases, 431, 438.

The judgment is affirmed.

JAMES B. JOHNSON, PLAINTIFF IN ERROR, VS. THE PENSACOLA AND PERDIDO RAILROAD COMPANY.

1. A demurrer to pleas reaches the declaration, notwithstanding a previous demurrer to the declaration overruled. Where a party pleads over after demurrer overruled, the demurrer is waived, and, in contemplation of law, ceases to be a part of the record.

2. The Pensacola and Perdido Railroad Company is a common carrier. At common law such common carrier cannot charge excessive or unreasonable rates of freight. The common law protects the individual from extortion and limits the carrier to a reasonable rate, but there is no common law rule requiring equal rates. What is charged one person, and the tariff of rates, are but matter of evidence to determine whether a charge is a reasonable compensation for the service performed.

Writ of error to the Circuit Court for Escambia county.

The plaintiff in error, who was plaintiff in the Circuit Court, sued the defendant in error in an action of assumpsit. The declaration contained several counts, but a non-suit having been taken as to all but the first count, this count

alone and the pleadings and proceedings relating to it constitute the case before this court.

The first count alleges that the defendant being a common carrier of lumber and other merchandise between Perdido bay and Pensacola bay, in the county aforesaid, and as such carrier bound by law to furnish the like transportation at the same rates of freight to all shippers by its railroad, did, in disregard and violation of its legal duty and obligation, compel the plaintiff to pay to the said defendant, between the 1st day of July, A. D. 1874, and the 1st of March, A. D. 1877, fifty cents per thousand feet on 4,400,000 feet of lumber shipped by plaintiff over said railroad, making an aggregate of $22,000 in excess of what the said defendant charged the Perdido Bay Lumber Company for like transportation over said railroad during *the said period between 1st day of July, A. D. 1874, and 1st of March, A. D. 1877*, and that thereby the said defendant became indebted to the plaintiff in the said sum of $22,000; and being so indebted, the defendant afterwards, to wit: on the 1st day of March, 1877, promised to pay to the plaintiff the said sum of $22,000; but although often so requested to do hath hitherto wholly refused to do.

To this count the defendant demurred. The court below, at special June Term, 1877, (upon condition that plaintiff should so amend his declaration as to make it clearly appear that the excess of the charge to plaintiff over the charge to the Perdido Bay Lumber Co. was made during the same time,) overruled the demurrer, but with leave to the defendant to demur to the amended declaration.

The plaintiff having so amended his declaration, by adding the words italicised above, the defendant demurred to it as amended, and set forth the following grounds of demurrer:

The declaration as amended does not state facts sufficient to constitute a cause of action, in this:

It does not state that the transportation, though like in kind, was furnished under like circumstances.

It does not state that defendant charged plaintiff anything it was not entitled to, under the laws of this State.

It does not state or show that, by action of defendant with the Perdido Bay Lumber Co., the plaintiff was injured.

That to state that defendant charged the Perdido Bay Lumber Co. less than established rates, does not raise an implied promise on part of defendant to refund any part of established rates that the plaintiff may have paid.

This demurrer was overruled, and the defendant excepted.

Defendant then filed six pleas. The 1st and 2d denied the alleged indebtedness and promise.

The 3d alleged that the charge to plaintiff of fifty cents per thousand in excess of what defendant charged Perdido Bay Lumber Co., was not for transportation under the same or similar circumstances; was not for the same amount of business, and was not in excess of the regular, legally established rates for the transportation of lumber.

4th. That the charge to plaintiff was the regular established rate for the transportation of lumber, and the charge of fifty cents less to the Perdido Bay Lumber Co. was not intended to be, and was not in fact, a discrimination against plaintiff, or in favor of the Perdido Bay Lumber Co., and was not made to damage the one or to benefit the other, and did not damage the plaintiff.

5th. That the less charge to the Perdido Bay Lumber Co. was for a good and valuable consideration for the benefit of the defendant, and was not an unreasonable or unjust discrimination between the plaintiff and the Perdido Bay Lumber Co., and was not for the purpose of benefiting the Perdido Bay Lumber Co., or prejudicing the plaintiff.

6th. That long before the plaintiff acquired any interest in mill property at Millview, or at any place on defendant's

road—and before said road was built and completed—and as the only means by which defendant could build and complete its road, the Perdido Bay Lumber Co., then known as R. F. Queal & Co., loaned to defendant upon very inadequate security a large sum of money, to be repaid in freight, to enable defendant to complete its road; and as an inducement to said loan, and as consideration therefor, said defendant, under the advice and counsel of its then principal director and legal adviser, one learned in law, and believed by defendant to be, of all men, the one who had most at heart the interest of defendant, to-wit: on the 16th day of February, A. D. 1872, agreed, for and during the period of ten years, from the date of the first shipment of lumber by the Perdido Bay Lumber Co., to make a deduction of one-third from the regular rate of freight on lumber that might be produced by any mill or mills which said Perdido Bay Lumber Co. would erect at Millview, or by one or both of two at that time unproductive mills at Millview, if said Perdido Bay Lumber Co. should purchase one or both of said mills.

That the regular established rate of freight was and is $1.50 per M. feet; and that defendant has, in pursuance of its contract, made deduction of one-third thereof, to-wit: fifty cents per thousand feet, for and in consideration of said loan as part compensation therefor, and also in consideration of the said Perdido Bay Lumber Co. furnishing defendant a great amount of business. All of which more fully appears from the copy of said agreement, which is hereunto annexed, marked "X," and made part of this plea.

That said plaintiff, after the making of said agreement, purchased and commenced operating his said mill on defendant's road at Millview, and on the 2d day of March, 1874, entered into a contract, which, among other provisions, expressly provided, that he should be charged the regular established rate of freight of one dollar and fifty cents per

one thousand feet for lumber transported on other than plaintiff's cars, as fully appears from a copy of said contract hereunto annexed, marked "Y," and made part of this plea.

And defendant avers that all the lumber, for the transportation of which plaintiff has been charged $1.50 per thousand feet, was transported on other than plaintiff's cars.

The following are the agreements referred to:

(X.)

STATE OF FLORIDA, }
ESCAMBIA COUNTY. }

This contract, entered into this the 16th day of February, A. D. 1872, by and between the Pensacola and Perdido Railroad Company of the first part, and Robert F. Queal & Co., of Chicago, of the second part, witnesseth:

That whereas, the extension of the said railroad from its present terminus on Bayou Chico, into Pensacola bay, is of vital importance to the party of the first part, and to the owners of mills at Millview; and whereas, the party of the second part is willing to make a loan of $10,000 to the party of the first part, upon the considerations, conditions and security hereinafter mentioned, in order to enable the party of the first part to make said extension; now, therefore, the said parties do hereby mutually contract and agree as follows, to-wit:

First. The party of the second part, for and in consideration of the undertakings hereinafter specified, of the party of the first part, does hereby agree to lend the party of the first part the sum of $9,000, in addition to the sum of $1,000 which has this day been paid to the party of the first part, making in all the sum of $10,000, and the remaining $9,000 the party of the second part contracts and agrees to pay the party of the first part, in installments, as the work of extending said railroad progresses, and upon a notice of ten days, to be given by the party of the first part to the party

of the second part, that such installments are required. And it is mutually agreed by the said parties that the said loan of $10,000 shall bear interest at the rate of ten per cent. per annum on each installment thereof, from the day it was received by the party of the first part; and that said loan shall be satisfied by the retention of twenty per cent. of the amount of the freight money which may become due by the party of the second part to the party of the first part, and at the expiration of every ninety days during the period the said loan shall be unsatisfied, the aggregate retention of freight money shall be ascertained and applied as a payment *pro tanto* of such loan and accrued interest; provided, however, that if said retention of freight money should not prove sufficient to discharge said loan, with the interest thereon, within three years from the date of the first installment thereof, then and in that case the said loan shall become due and payable, with interest thereon as aforesaid, by the party of the first part to the party of the second part.

Second. That as a part of the consideration for said loan of $10,000, the party of the first part agrees and contracts to transfer to the party of the second part twenty-five (25) shares of the stock of the said Pensacola and Perdido Railroad Company, immediately after the payment of the last installment of said loan of $10,000.

Third. That as an additional consideration for the loan of ten thousand dollars as aforesaid, the party of the first part does hereby contract and agree, for and during a period of ten years from the date of the first shipment of lumber by the party of the second part over said road, to make a deductiou of one-third from the regular rate of freight on lumber that may be produced, at the option of the party of the second part, to the extent of thirty millions, or under, annually, by any mill or mills which the party of the second part may, at their option, erect at Millview or either or both of the mills now erected on mill lots five (5) and six (6) in

the plan of Millview, in said county and State, (in case the party of the second part should in their discretion see fit to purchase either or both of said mills on said mill lots five and six,) from said mill or mills to the terminus of said railroad in Pensacola bay, after the competion of the extension of said railroad as hereinafter provided; and it is hereby understood and agreed that the regular rate of freight above mentioned, and from which said deductions of one-third shall be made, shall be as announced to mill owners at the commencement of said railroad enterprise, one dollar and fifty cents per thousand feet, board measurement, free of wharfage on lumber and vessels, and that said rate shall be and remain the regular rate of freight during the whole of said period of ten years.

Fourth. That the party of the first part, for and in consideration of the said loan of ten thouand dollars, hereby contracts and agrees and binds itself to complete within eight months from the date hereof, no act of God preventing, the extension of said railroad from its present terminus on Bayou Chico into Pensacola bay, as far as eighteen feet of water, according to the survey of said railroad now on file in the office of the party of the first part; and it is hereby understood and agreed that in the event of the failure of the said party of the first part to complete said extension as aforesaid, that then and in that event the said loan of ten thousand dollars, with interest thereon as aforesaid, shall become due and payable, and as security for the completion of said extension within the time above specified, as well as security for the loan as aforesaid, and the repayment of the same in the event of the failure of the party of the first part to complete the same within the time above specified, the party of the first part has this day executed to the party of the second part a second mortgage on the said railroad, the real and personal property, and the franchises of the party of the first part.

Fifth. That the party of the first part hereby contracts and agrees at its own expense to provide the necessary switch, or track, to connect the said mill or mills of the party of the second part with the main line of said railroad.

Sixth. That in case of a failure to complete said railroad as above provided, then and in that case all provisions of this contract shall continue and be in full force for the period so stipulated, except as to the maturity of the loan of ten thousand dollars.

P. & P. R. R. CO.,
By B. F. SIMMONS, President.
ROBERT F. QUEAL & CO.

(Y.)

This agreement entered into this 2d day of March, 1874, between the Pensacola and Perdido Railroad Company of the first part, and J. B. Johnson of the second part, witnesseth:

That the party of the second part hereby covenants and agrees to place upon the road of the said company, party of the first part, five (5) new cars similar to those now owned by the party of the first part in operating their road.

The party of the second part further agrees to keep said cars in good repair to the satisfaction of the Superintendent of said road.

It is further agreed that said cars are to be used in the transportation of the produce of the said party of the second part, and under the regulations of said company as to the manner and quantity of loading such cars. That in consideration of the above stipulations the party of the first part agrees to transport over their road the produce of said mill of the party of the second part, loaded upon said cars, at the rate of one dollar per thousand superficial feet.

It is further understood and agreed that the above stipulated rate of freight, viz: of one dollar per thousand feet.

applies only to the five cars owned by the party of the second part, and not to products loaded on other cars at said mill, on which the regular established rate of freight of one dollar and fifty cents per thousand superficial feet will be charged.

It is further mutually agreed that this contract is to continue in full force until the said railroad company purchases said cars at the original cost, less any needed repairs on the same, upon giving the said party of the second part six months' notice of their intention to purchase the same.

It is further mutually agreed that the party of the second part shall have the privilege of placing five more cars on the road, on the same terms as heretofore stipulated, and as soon as the said ten cars are placed upon the road, in working order and ready for use, it is further agreed between the said parties that in case of emergencies in the business of either they will endeavor to aid each other to meet such emergencies by a loan of cars or trucks, provided that upon request such loan can be made without interfering with the business of the party to whom the request shall be made.

P. & P. R. R. CO.,
Per B. F. SIMMONS, President.
J. B. JOHNSON.

The plaintiff joined issue on the 1st and 2d pleas to the first count, and demurred to the 3d, 4th, 5th, and 6th pleas to that count, and assigned the following grounds of demurrer, viz:

To the third plea:

1st. Facts are not stated showing the discrimination was lawful.

2d. The amount of business done by the plaintiff and the Perdido Bay Lumber Company, respectively, is not stated.

3d. Discrimination cannot be legally justified on mere difference in amount of business.

4th. There can be no legally established rates, when one rate is not applied to all persons for like service.

To the fourth plea:

1st. One dollar and fifty cents could not be the regular rate for plaintiff, if one dollar was the rate for the Perdido Bay Lumber Company for like service.

2d. The intention not to act illegally cannot make unlawful discrimination legal.

To the fifth plea:

1st. The consideration is not set forth so as to enable the court to judge of its sufficiency.

2d. It is not shown how the consideration was a benefit to the plaintiff.

3d. It is not stated that plaintiff accepted such benefit as an equivalent for the discrimination against him.

4th. No facts are set forth showing that the admitted discrimination was lawful.

5th. The purpose for which an unlawful discrimination is made cannot make it legal.

To the sixth plea:

1st. The contract of the Perdido Bay Lumber Company and defendant, so far as it undertook to authorize a discrimination in favor of said company and against other shippers, was void, as being against public policy, and contrary to law.

2d. Defendant could not, by contract with the Perdido Bay Lumber Company, disable itself to discharge its legal duty as common carrier to furnish plaintiff with like transportation at like rates of freight as it furnished and charged said comaany.

3d. The contract between plaintiff and defendant of 2d of March, 1874, only required plaintiff to pay $1.50 as the regular and established rate; and it could not, in law, be such rate, since it was not charged to the Perdido Bay Lumber Company as well as to plaintiff.

The court overruled the demurrers, and the plaintiff not desiring to plead over, and taking a non-suit as to all the counts of his declaration, except the first count, final judgment was entered for the defendant. Plaintiff sued out a writ of error, and assigns for error the overruling and demurrers to said 3d, 4th, 5th and 6th pleas, and giving judgment thereon for defendant.

R. L. Campbell for Plaintiff in Error.

The Circuit Court, in overruling the demurrers to the 3d, 4th, 5th and 6th pleas to first count of the declaration, committed the errors assigned.

The main questions of law involved in the case were decided upon the demurrers to the declaration, and to that decision defendant submitted by pleading over. Ellison vs. Allen, 8 Fla., 206.

The decision embraced four propositions:

1st. That defendant, being a common carrier of lumber and other merchandise, was guilty of an unlawful discrimination in compelling the plaintiff to pay 50 cents more freight per M. feet of lumber than it charged the Perdido Bay Lumber Company for like transportation during the same period of time.

2d. That such discrimination was an infraction of the common right of all citizens to demand and have like transportation, during the same time, at one rate of freight, for the like article.

3d. That such discrimination was an injury to the plaintiff to the extent of the excess of 50 cents per M. feet, which he was compelled to pay, over and before what was charged to the Perdido Bay Lumber Company.

4th. That such excess of 50 cents per M. feet was so much money illegally obtained from plaintiff, and for which he could maintain an action of assumpsit.

In support of the 1st, 2d and 3d propositions may be cited: Chicago & Alton R. R. Co. vs. People, 2 Railway R., 242; 67 Ill., 11; McDuffie vs. Portland, &c., R. R., 52 N. H., 430; New England Express Co. vs. Maine Central R. R. Co., 57 Maine, 188; Messenger vs. Pennsylvania R. R. Co., 7 Vroom, 406; Camblos vs. Phila. & Reading R. R. Co., 4 Brewster, 563; Indianapolis, &c., R. R. Co. vs. Rinard, 46 Ind., 293; Andenreid vs. Phila. & Reading R. R. Co., 68 Penn. St., 370; Vincent vs. Chicago & Alton R. R. Co., 49 Ill., 33; Eclipse Tow Boat Co. vs. Pontchartrain R. R. Co., 24 La. An., 1; Shipper vs. Penn. R. R. Co., 47 Penn. St., 338; Chicago, B. & Q. R. R. Co. vs. Park, 18 Ill., 460.

"A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office." McDuffie vs. Portland, &c., R. R. Co., *supra.*

"The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences." New England Express Co. vs. Maine Central R. R. Co., *supra.*

"The commonness of the right necessarily implies an equality in the sense of freedom from unreasonable discrimination." Ibid.

"And such equity embraces terms, facilities and accommodations; and any practical invasion of the common right, by an unreasonable discrimination practiced by a carrier, held to the common service, in insubordination and mutiny, for which he is liable to the extent of the damage inflicted, in an action of case at common law." Ibid.

"A service, or price, that would otherwise be reasonable, may be made unreasonable by an unreasonable discrimination in violation of the common right." Ibid.

"It is in vain to say in defence of such discriminations made without a just cause, that the rate of charges against

the injured person or locality is a reasonable rate, and therefore no injury is done." Chicago, &c., R. R. Co. vs. People, *supra.*

Carrying for a reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively. 2 Redfield on Railways, 96.

5th. The rule of compensation furnishes the measure of damages. Sedg. on Damages, 32, 33, 36.

To compensate plaintiff, he must be placed where he would have been but for the discrimination against him; that is to say, he must be reimbursed the 50 cents per M. feet of lumber, with interest for the use of his money.

The law of equality required that plaintiffs' enjoyment of the common right should be measured by that of any and ever other citizen's enjoyment of the same right; and his loss is what he is compelled to pay more than any other citizen for the like service.

Plaintiff had a right to demand that his transportation should be at the same rate as that of the Perdido Bay Lumber Company; and, if he was charged 50 cents more per M. feet of lumber, that excess is necessarily the measure of his loss.

The rule is neither arbitrary nor artificial, but harmonizes with the actual business result—gain to the favored company, and loss to the disfavored individual.

Cost of transportation is a large factor in estimating the value of a ponderous article like lumber. Starting in the race of competition with an advantage of 50 cents per M. feet, that advantage will be maintained by the favored company in every market and every sale.

Illegal toll extorted by a toll-keeper may be recovered in an action of assumpsit. Brown's Actions at Law, 537.

Money illegally demanded and paid under the pressure of immediate and urgent necessity may always be so recovered.

Sasportis vs. Jennings, 1 Bay, 470; Astley vs. Reynolds, 2 Strange, 916; Parsons on Contracts, 392.

Do the 3d, 4th, 5th and 6th pleas state any facts which avoid the case made by the first count of the plaintiff's declaration, which the court had adjudged to be well founded in law, and is so fully sustained by reason and authority?

The third plea is bad.

1st. It does not state facts showing that the discrimination alleged in the declaration was lawful.

The statement, that the transportation was not under like or similar circumstances, does not satisfy the rule of pleading, which requires "a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them; by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." 1 Chitty Pl., 233.

No circumstance is stated, showing in what respect the transportation was unlike or dissimilar.

There is no traverse of the allegation of the declaration that both the greater and less rates were charged "for like transportation," i. e., for the same articles and for the same distance. But whilst the plea, impliedly, admits that the two charges cover "like transportation" of lumber, it pleads in avoidance that the circumstances, under which such "like transportation" occurred, were not alike or similar; and thus, whilst it fails to traverse the declaration, it also fails to state the dissimilar "circumstances" under which the two rates were applied, although such circumstances constitute the matter in avoidance.

2. If difference in amount of business done on defendant's road by the plaintiff, and Perdido Bay Lumber Company, respectively, is one of the circumstances relied upon it makes the discrimination lawful, the plead is bad; be-

cause it does not state which was the larger shipper, or how much was shipped by each.

3d. But a mere difference in the amount of business of two shippers cannot justify a discrimination; for if so, a difference of one bale of cotton, barrel of flour, or 1,000 feet of lumber between two shipments, would enable carriers to discriminate between shippers, and thus defeat the rule of equality.

4th. And lastly, the plea is bad, because it assumes that there can be a regular rate which applies to one shipper and not to another, for like transportation; and, that assumption is made, too, in the teeth of the decision of the court on the demurrer to the first count of the declaration. Chicago, &c., R. R. Co. vs. People, *supra.*

The fourth plea is bad.

1st. For the reason assigned for the last objection to the third plea. Again, in denying that there was any discrimination in fact, while admitting those circumstances which, in the judgment of the court, presented a case of discrimination, the plea not only raised a mere question of law, but one which had already been disposed of in a previous stage of the case.

2d. Whilst admitting the illegal act, and the resulting injury to the plaintiff, implied by law, the plea alleges, in avoidance of both, the absence of intention to discriminate against or to injure the plaintiff.

"In civil actions the law does not regard the intent of the actor, but the loss or damage of the party suffering." Auburn, &c., vs. Douglass, 12 Barb., 557; Ecker vs. Moore, 2 Chand., 85; Keith vs. Howard, 24 Pick., 392; Lacy vs. Swartout, 10 Peters, 81.

The fifth plea is bad.

1st. The consideration is not so set forth as to enable the court to judge of its sufficiency, in the sense of being a legal and adequate consideration for an act affecting the

public duties and obligations of the defendant as a common carrier.

In ordinary cases the rules of pleading require the consideration to be stated. (1 Chitty Pl., 194.) Still more important is it, that the consideration should be shown where the agreement affects, not only the interests of the parties to it, but those of the public also.

2d. It is not shown how the consideration was a benefit to the plaintiff.

Consideration and benefit are equally unspecified.

3d. It is not even suggested that plaintiff accepted the unnamed benefit as an equivalent for the discrimination against him.

4th. No facts are set forth showing the admitted discrimination to be lawful, *i. e.,* reasonable and just; but the plea again raises the question of law, which the court had decided upon the demurrer to the first count of the declaration.

5th. The purpose for which an unlawful act of discrimination is made cannot make it legal.

The court had already decided the discrimination to be both unlawful and injurious to the plaintiff. And according to the authorities above cited, good intention neither legalizes the one nor compensates the other.

The sixth plea is bad.

In it are disclosed the "circumstances," "considerations," "benefits," and "established rate," faintly shadowed and "antithetically mixt" in the 3d, 4th and 5th pleas.

The contract with R. F. Queal & Co., which is made a part of the plea, discloses the fact that at its date the defendant's road was operating between Perdido bay and Bayou Chico, an estuary of Pensacola bay; that mills, dependent on it for transportation, had been built and were in operation; that defendant was engaged in the business of a common carrier; and that a "regular rate" of freight on

lumber had been announced to mill owners at the commencement of the enterprise.

1st. This contract, so far as it provided for a discrimination in the rate of freight in favor of R. F. Queal & Co., and against other shippers, was void as being contrary to law and public policy. 2 Parsons on Con., 748; Railroad Company vs. Lockwood, 17 Wall., 357.

The law required defendant to have a regular, that is to say, uniform rate, applicable to all shippers.

The contract bound defendant to destroy that uniformity and regularity of rate by making it inapplicable to R. F. Queal & Co.; and in effect, fixed the rate of freight for them at $1, and for other shippers at $1.50.

It is just such discrimination as the contract provides for that the Circuit Court, and the authorities above cited, declare to be illegal.

Indeed, every discrimination rests upon a contract, express or implied, between the favored shipper and the carrier.

To plead, then, that the discrimination in this case rests upon a contract between the favored shipper and the defendant, is simply to show that it rests, like other agreements, upon the consent of the parties to it.

That the contract was not implied or verbal, but in writing, and under the seal of defendant, may make the wrong more deliberate, but cannot make it right.

The objection does not, nor does this case require it to go to the extent of denying the obligation of the contract as between the parties to it. The impeachment for illegality begins at the point where it touches the public, which was not a party to it. Peoria, &c., R. R. Co., vs. Coal Valley Mining Co., 2 Am. Railway Cases, 295.

The complaint is not that R. F. Queal & Co. are charged less than was announced to mill owners at the inception of the enterprise, nor that the charge of $1.50 is not extended

to them, but that the freight on lumber having been reduced for them to $1, the law of equality and common right forbade defendant to charge other shippers more than this reduced rate.

2d. Ground of demurrer.

A common carrier cannot disable himself to perform any of his legal duties. Peoria, &c., R. R. Co., vs. Coal Valley Mining Co., *supra;* Railroad Co. vs. Lockwood, 17 Wall., 357; Hartford, &c., R. R. Co., vs. New York, &c., R. R. Co., 3 Rob., 411; 7 Vroom, 406.

The contract prevents defendant from exercising towards all shippers the impartiality demanded by the rule of common right.

It prevents defendant for ten years from lowering its rate of freight on lumber, even though its condition and business might justify such reduction.

In so doing it divests itself of its public office of common carrier, and becomes a private carrier; for its public duty is made subservient to the interest of one shipper.

Besides plaintiff's contract with the defendant, hereafter to be discussed, three circumstances are relied upon to legalize the discrimination on which this action is founded.

1st. The discrimination was a part of the consideration for the loan of $10,000, which was necessary to finish defendant's road.

Admitting defendant's pecuniary necessities, and considering also the right of Queal & Co. to demand, and defendant to make, a reduction on its lumber freight to them, as a part consideration for the required loan, the question arises, what obstacle is there to defendant's making a like reduction to the public, in order to meet the demand of the law of equality, springing from the common right?

The money was obtained, the road completed, and the lender got, besides his interest, mortgage, and bonus in stock, the required reduction in freight.

The public demand is confined to a like reduction to all shippers.

To this demand it is replied, defendant is bound for ten years to make no reduction to the public.

The objection comes, not from the favored shipper, but the carrier,

And his plea, in answer to the public demand for equality of rates, founded upon common right, is, that defendant must discriminate, because he has contracted to do so.

In a word, it cannot practice the equality which the law demands, because it has agreed to exercise that inequality which the law forbids.

Such is the ultimate proposition upon which the plea rests, viewed in the light of the authorities already cited.

But there are other considerations which prevent defendant's pecuniary necessities from having any bearing on the question of discrimination.

Defendant having derived its existence from a charter of this State involving the exercise of the right of eminent domain, is a public corporation. Olcott vs. Supervisors, 16 Wall., 678; Acts 1868, 151; 13 Fla., 704.

That charter is a contract between the State and the defendant, by which the latter bound itself to build and operate the road for the public; not only as the consideration for the corporate being and other franchises bestowed upon it, but because that public character was and is, and must ever be a constitutional condition of its existence. R. R. Com'r. vs. P. & O. C. R. R. Co., 63 Maine, 268; Olcott vs. Supervisors, *supra*; Sanford vs. Railway Co., 24 Penn., 378.

The defendant's road, therefore is, and always has been, a public highway. Ibid.

In the use of that highway all citizens have an equal interest, and must be treated alike. Messenger vs. Pennsyl-

vania, &c., R. R. Co., 7 Vroom, 406, and authorities above cited.

The $10,000 was, in fact, borrowed from Queal & Co. to enable the defendant to execute its part of the contract with the State—to build and maintain its road for the equal use, in every regard, of all citizens.

Can the pecuniary straits of defendant be accepted as a justification of a breach, or change in the terms or spirit of its contract, without the consent of the State, supposing the State to be competent—which is at least doubtful—to bind the public by such consent, to submit to an unequal, partial and discriminating enjoyment of a common right?

2d. That the discrimination was "in consideration of the said Perdido Bay Lumber Company furnishing defendant with a great amount of business."

The contract contradicts this statement; for it only provides for lumber that may be manufactured to the extent of 30,000,000 feet or under, and therefore the discrimination applied to any quantity short of the 30,000,000.

Besides, we have no comparative statements of the quantity shipped by plaintiff and the favored company, and, therefore, the argument is but fair that we have no such statements, because they would not sustain defendant's case.

But to justify discrimination on the ground of the mere difference in the amount of business done by shippers would be to make the effect justify the cause.

For to say that for like transportations, one mill, one cotton shipper, or one town, shall be charged less freight than another, is a sure way of enabling it to ship more than such other. The carrier would decide the race of competition before it begun. But this feature of the plea does not touch the objection which lies at the root of a discriminating rate.

The essence of discrimination is, that you do for one shipper what you will not do for another.

Here the rate was reduced one-third, in consideration of a great amount of business, as it is pretended. Now, if a "great amount of business" was to be obtained from one shipper by a reduced rate, why might not another "great amount" be procured from another shipper by a like reduction? But the contract absolutely forbids, for ten years, any reduction to any other shipper.

It is patent, therefore, on the face of the contract itself, that it was not "a great amount of business" to be secured that prompted the arrangement, but an undue advantage to be conceded to Queal & Co. over and above all other shippers.

In respect to the express undertaking, not to do for others what was done for Queal & Co., this case stands alone in the history of discrimination.

3d. That contract was entered into long before plaintiff acquired any interest in mill property on defendant's road.

It is a sufficient answer to this point, that the contract was void at its inception, so far as it touched the rights of the public, of which the plaintiff is one.

Again, plaintiff's rights, as one of the public, to use defendant's road at such such time as he saw fit on like terms as any other citizen, is something derived from the State, which the defendant can neither abridge nor destroy.

The third ground of demurrer alleges that the contract between plaintiff and defendant required plaintiff to pay $1.50, "as the regular established rate," but that $1.50 was not such rate, since the Perdido Bay Lumber Company was not required to pay more than $1.

The plea admits that plaintiff contracted to pay $1.50, as the "regular established rate;" but relying on the order of time in which the contracts were executed, without venturing, however, to charge upon plaintiff notice of the Queal & Co., agreement, it insinuates, rather than charges, that

plaintiff's undertaking was to pay $1.50 absolutely, when he shipped on defendant's cars.

As plaintiff's contract makes no reference to the Queal & Co. contract, and he had no notice of it, the latter can have no bearing on the construction of the former.

As $1.50, according to the plea, had been announced to mill-owners as the regular and established rate, so it is recognized in plaintiff's contract.

The end and object of plaintiff's contract was to enable him to facilitate his transportation by putting five cars on defendant's road, and to fix the rate of freight on them, and not to fix the rate of freight when defendant's cars were used, for the contract assumes this rate to be already "established."

The reference to the $1.50 rate was made, not for the purpose of incorporating it into, but excepting it from the operation of the contract, and, at most, it is but a recognition of what was the regular rate at the date of the contract, and perfectly consistent with the case presented in the first count of the declaration.

The contract is dated 2d March, 1874. The discrimination complained of began, according to the declaration, on 1st July, 1874.

Consent, that on 2d March, 1874, $1.50 was the regular established rate, is no recognition of it as such rate on and after 1st of July, 1874, when it had become an irregular, partial, discriminating, and, therefore, illegal rate.

Again, if this feature of the contract is viewed, not as an exceptional clause, or mere recognition of an existing rate, but as an agreement to pay $1.50, as "a regular established rate," the agreement involves two obligations. Defendant contracts that $1.50 shall be the regular established rate, that is to say, the uniform rate required by the common right, and applicable to all shippers. The plaintiff contracts to pay the rate, not absolutely, but conditionally, upon its

remaining such "regular established rate." The undertakings are dependent, and the agreement expresses only the correlative right and duties of the parties as prescribed by law.

To an action on the contract by defendant against plaintiff for freight at the rate of $1.50, would it not be a good plea in bar that at the time the same was reduced, $1.50 had ceased to be the regular established rate?

To read the agreement as an undertaking to pay $1.50, absolutely and unconditionally, the words "regular established rate" must be blotted out.

To retain them is to exclude the idea of any but a common and equal rate, applicable to all shippers.

"Regular" implies uniformity, according to rule or law. "Established" implies fixed, settled. Is that rate uniform which applies to one man and not another? Can that be settled and fixed in law which is contrary to law?

This construction of plaintiff's agreement is in harmony with its language and the rules of law which it embodies, whilst it is consistent with the legal duties and obligations of defendant as a common carrier, whose contracts are always construed so as to make them accord with those duties and obligations. The St. Louis,&c., Railway Co. vs. Smuck, et al., 49 Ind., 302.

Any other construction would work the grossest injustice to plaintiff; for when he shipped on his own cars, (the use of which it is fairly inferrable from the agreement was worth to defendant 50 cents per M. feet of lumber,) he would be charged the same rate as the Perdido Bay Lumber Company, which relied on the defendant's cars exclusively. On the other hand, when plaintiff shipped on defendant's cars he would be charged 50 cents more than that company, and thus, in either case, he would be the object of hostile, and the company of favorable, discrimination to the extent of 50 cents per M. feet, a difference sufficient to break him

down in the race of competition, especially on a low market.

This action is for the 50 cents excess of the discriminating charge when plaintiff shipped on defendant's cars, between 1st of July, 1874, and 1st March, 1877. And the following is a summary of the principles on which it rests:

Equality is the measure of the enjoyment of a common or public right, as it is of the burdens of such enjoyment.

The maximum enjoyment of such rights conceded to one for a given charge, is the minimum enjoyment to which another can be restricted for a like charge.

On the other hand, the minimum charge fixed for a given amount of enjoyment by one, is the maximum charge that can be exacted from another for a like enjoyment.

And a contract between the manager of such public right, or use, with one party, to change that measure of enjoyment or burden is as futile as against the public, as would be the attempt to bind the rights of C. by a contract between A. and B.

Nor can the impecuniosity of such manager be pleaded as a justification in such case, any more than it could be available as a defence for the breach of any other legal obligation.

E. A. Perry for defendant in Error.

The plaintiff claimed the right to recover back, by an action of assumpsit, fifty cents per thousand feet, or one-third of the amount paid for three years' transportation of lumber upon defendant's cars and road; not because that amount is in excess of the "tariff or charges adopted" by defendant; not because the charges were unreasonable, but simply on the ground that defendant transported lumber for another party at less than its tariff and less than a reasonable charge.

Such is plaintiff's case without defendant's pleas.

It is true that to consider the case as presented by plaintiff's declaration alone involves a consideration of the propriety of the Circuit Court overruling defendant's demurrer to it, and that defendant by reason of having plead, could not avail itself of the error to reverse a judgment against itself; but here the plaintiff seeks to reverse a judgment, and to do so he must show that he is entitled to a different judgment.

He is not entitled to different judgment unless his declaration so entitled him. This court, then, may at the outset, and without inquiring into the sufficiency of defendant's pleas, refuse to reverse the judgment, because of the insufficiency of plaintiff's declaration to sustain a different judgment.

To hold that plaintiff's declaration would support a judgment in his favor, the court must hold that defendant, by carrying for the Perdido Bay Lumber Company at one-third less than its tariff rate, became indebted to the plaintiff in one-third of the amount received for the three years' service. Had defendant carried for Perdido Bay Lumber Company for nothing, then it would have become indebted to the plaintiff in the whole amount paid it for transportation; and this without any allegation that plaintiff was in any respect injured by defendant's liberality to the Perdido Bay Lumber Company.

This is very different from a case where a carrier had charged a customer more than its adopted tariff, or more than a reasonable rate, which party had paid under protest. In such case he might, probably, by action recover back the over-charge, or if carrier's rates are limited by statute, and the carrier charges and the customer pays beyond the limit.

The defendant's demurrer to the declaration was overruled mainly upon the authority of Chig. & Alton R. R. Co. vs. People, 2 M. Amer. R. R. cases, 282, and McDuffie vs. P.

& R. R. R. Co., ib., 261, cases dependent upon statute; but great stress being laid upon loose observations, as to the common law requiring absolute equality of charge, from which was deduced the proposition that a naked charge that a carrier had carried for one customer at a less rate than for another, was a charge of unlawful discrimination, and imposed upon the carrier the duty of denial or justification.

Such, perhaps, may be the case under the statutes of many of the States, and under the statutes of England, as for instance the Railway Traffic Act, 17 and 18 Vict., c. 31, which prohibit inequality of charges; not, however, under any statute or the common law in force in this State.

The common law limited carriers to a reasonable charge. (3 Taunt., 264,) but imposed upon them no obligation to charge equal rates to all their customers. Baxendale, et al. vs. The Eastern Counties Railway Co., 4 C. B., (N. S.,) 63-79; Fitchburg Railway Co. vs. Gage, 12 Gray, Mass., 393, 398-9.

Adopting the line of argument of Chief Justice Taney, in Bank of Augusta vs. Earle, 13 Peters, 519, 591, we say the very fact that the acts prohibitory of discrimination are passed in England, would of itself show that the common law is not as claimed by plaintiff, and the language of those prohibitory acts most clearly indicate that the acts forbidden by them might lawfully have been done before those laws were passed.

As I understand the authorities so much relied on by plaintiff, they do not go beyond this: That a less charge to one customer than to another, for like transportation under the same or similar circumstances, is an unlawful discrimination.

Those very authorities hold that mere difference in amount charged does not constitute a discrimination; and the derivation and meaning of the word show that such dif-

ference is but one element that goes to make up what is understood and meant by the word; much less does that mere difference constitute an "unlawful," i. e. an "unjust and unreasonable" discrimination.

To hold the facts alleged in the declaration sufficient to authorize a judgment for the plaintiff, would be to hold that any railroad in the State which has carried passengers or freight free, thereby has become indebted and liable in an action upon promises to such parties as have paid fare or freight for the whole amount of the earnings.

Should the court determine that the insufficiency of the declaration cannot now be insisted upon by the defendant, or considered by the court; or if it be considered, and there is any doubt in the mind of the court as to whether it would sustain a different judgment, there can be but little difficulty in sustaining the judgment when the declaration and pleas are considered together.

Were there statutes here, as in many other States and in England, prohibiting discrimination, the pleas set forth a full defence.

The 3d plea denying the existence of a necessary constituent of a discrimination, denies a discrimination; much more does it deny an "unlawful discrimination."

"Circumstances alter cases;" make the circumstances different and you make the cases different. To compel a common carrier, because licensed by the State, to treat all cases, however different, in identically the same way, would be like compelling the doctors, because they are licensed, to administer to all parties identically the same medicine, regardless of different symptoms and circumstances. When the plaintiff, by his demurrer, admits the 3d plea, he admits there was no discrimination, lawful or unlawful.

By admitting the 4th plea, he admits that he was not damaged by the action of defendant. The suit is solely for

damages, and by his demurrer to 4th plea he admits he has no cause of action.

The purpose of the 5th plea is to negative any charge or implication that the defendant charged the fifty cents less in discrimination between the Perdido Bay Lumber Co. and the plaintiff, and to that end the plea alleges that the less charge was made for the benefit of defendant and not to benefit the Perdido Bay Lumber Co., or prejudice the plaintiff, and therefore was not an "unreasonable, unjust, or unlawful discrimination." Nor would it have been under the strict statutes in force in England. Nicholson vs. Great Western Railway Co., 5 C. B., (N. S.) 366.

The 3d, 4th and 5th pleas, then, negative the existence of those facts upon which the courts in the cases cited by plaintiff held the carriers guilty of unjust, unreasonable and unlawful discrimination.

Possibly some of those pleas might be objected to, as equivalent to the general issue; but that objection cannot, under our practice, be reached by demurrer.

As to the 6th plea.

The plaintiff's main argument to support his demurrer in the court below was, that this plea is bad because the contract "X," which is attached to show the consideration that took the place of the fifty cents less charge to the Perdido Bay Lumber Co., is, as he claims, void as against public policy, inasmuch as it seeks to bind defendant to do an unlawful act; that is to keep the regular and established rate of freight at $1.50.

Whether or not that contract is wholly good, or wholly or in part bad, as a contract; whether or not it does in law bind defendant to do what it contracted to do, it is not necessary to discuss. That question in no way affects this case or the sufficiency of the plea.

This plea fully sets forth the consideration which defend-

ant received in lieu of the fifty cents per thousand feet for freight.

Admit, if plaintiff so desires, that the contract is bad; the $10,000 is not bad; there is nothing void in that.

And it is not material whether or not the Perdido Bay Lumber Co. could force the defendant to carry its lumber and make the agreed deduction, although it paid the $10,000 for freight in advance and built up a large business for defendant. The only question is, did considerations move from the Perdido Bay Lumber Co. to defendant, so that defendant was justified in, and benefited by, securing that money and that business upon the terms of the agreement?

Was there any consideration which supplied the place of the fifty cents per thousand feet? Was not the payment in advance, and long in advance, a consideration?

Admit that the contract was ineffectual to bind the company, for the reasons urged by plaintiff, still there remains the fact shown by the contract, or paper, or whatever it may be called, that the defendant was induced to remit fifty cents per thousand feet, in consideration of the use of $10,000, which the lender could only hope to get back by doing what defendant was at that time moving heaven and earth to have done, that is, by building up a large business for the road.

So as to the contract between plaintiff and defendant: it may be a void contract in every particular urged by the counsel for the plaintiff; yet the plea is a good plea, and the contract fulfills the part allotted to it. It shows defendant could have had no intention of discrimination in favor of the Perdido Bay Lumber Co., and against the plaintiff; of attempting to build up one and keep down the other, as argued by plaintiff. It shows that plaintiff well knew defendant's established rates of $1.50, and that he, in consideration of certain advantages, (the privilege of putting his

own cars on the road and transporting upon them at less rate) voluntarily contracted to pay that established rate for freight shipped on defendant's cars.

Plaintiff having thus for a consideration voluntarily contract to pay the rates and prices he has paid, by what principle does he now come and claim the right to recover that money back, without any allegation of fraud, undue advantage or concealment?

Plaintiff makes no complaint of invidious discrimination in allowing him fifty cents deduction from the adopted tariff, in consideration of his furnishing cars for the road, which (inasmuch as defendant had the right to become the owner of said cars by refunding to the plaintiff the cost thereof) was one form of making a loan to defendant, but the cry comes in when the Perdido Bay Lumber Co. is allowed the same in consideration of its furnishing the money necessary for defendant's very existence.

The plaintiff discerns a great difference between freight being carried on his cars, and another customer's money.

That the consideration and inducements for the less charge to the Perdido Bay Lumber Co. would be sufficient, under the most strict laws against discrimination, is seen by a careful examination of the plaintiff's own authorities, and by reference to Nicholson vs. Great Western Railway Co., 5th C. B., (N. S.) 366, reviewed and reaffirmed in 7th C. B., (N. S.) 755.

If a full defence under the statutes prohibitory of unequal charges, can it be questioned that they constitute a defence under the laws of this State, by which defendant, though limited to a reasonable charge, is under no obligation to charge equal rates to all its customers?

Defendant confidently submits that the record does not show that plaintiff is entitled to a different judgment, and that the judgment of the Circuit Court should be affirmed.

The word "unlawful" in the declaration does not supply

want of allegation of such facts as would make the acts charged against defendant a discrimination.

"Charging A. less than B. for the same service, or service of the same nature, is not, of itself, necessarily charging A. too little or B. too much." See authority so much relied on by plaintiff. McDuffie vs. R. R., 52 N. H., 453.

If plaintiff is not injured, he has no cause of action. 52 N. H., 451-453.

The simple allegation of unequal charge, then, does not set forth facts sufficient to constitute an action, unless by the common law in force in this State there is positive prohibition of a mere nominal inequality.

The cases cited by plaintiff to show that a mere naked inequality of price is *prima facie* unreasonable and undue preference and discrimination, as far as defendant's counsel could catch his citations, (he not being furnished with any list of them as required, I understand, by rule of court,) are all cases under State statutes, and the court will see that these cases hold that "neither the service nor the price is necessarily unreasonable because it is unequal in a certain narrow, strict and literal sense."

The question is not merely whether the service or price is absolutely unequal in the narrowest sense, but also whether the inequality is unreasonable and injurious. McDuffie vs. R. R., 52 N. H., 451.

By what rule of pleading then can the mere charge in the declaration of naked inequality in price be held sufficient to constitute an action?

So much in reply to plaintiff's argument to the sufficiency of the declaration.

It is clear from careful examination of the authorities relied upon by plaintiff that even under those authorities the declaration does not entitle plaintiff to a different judgment, much less then can it do so under the law of this State, which is the common law of England, concerning which the

courts of England will be considered the best interpreters. If the law of the State requires modification to protect the people against corporations, defendant has no fear but that this court will leave it to the Legislature to make the modification.

But if we admit the declaration sufficient, and admit that the common law, and that is the law of this State, imposes upon common carriers the obligation to charge equal rates to all their customers, the pleas come in and deny the inequality, for they show that the defendant received as much benefit for its service from the one customer as the other. The $1 paid to defendant, February 16, 1872, for service to be rendered July 1, 1874, was equal to $1.50 charged to plaintiff and paid at the time of service. Where, then, is the inequality of price? It is no more of an inequality than if one customer had paid for his freight one dollar in gold worth one dollar and a half, while plaintiff paid in currency worth only par.

By reference to the two contracts attached to the pleas, it will be seen that defendant was not only ready to extend, but actually has extended to the plaintiff the same or similar privileges. In consideration of plaintiff's loaning five cars he gets reduction upon a great part of his shipments, the same as that allowed to the lender of the money, and to this day he may get the same reduction on all his shipments by availing himself of the privilege extended to him of loaning the defendant five more cars.

The court cannot fail to observe the difference between contract X. and the contract in Messenger vs. Penn. R. R. Co., (7 Vroom, 407,) cited by plaintiff, and the only case in which it does not appear that any State statute figured.

In the contract in that case it does not appear that there was any payment in advance, or other circumstances that made the less price for which the railroad company had

agreed to carry plaintiff's goods equal to the prices charged to others.

In contract X. there were circumstances and considerations which made the nominally less charge to the P. B. L. Co. equal, if not greater than the adopted tariff charged to plaintiff.

So even in a suit by the P. B. Lumber Co. vs. defendant, under contract X., it is by no means clear the contract would not be enforced. But in this case the contract is not pleaded as a contract, but is an exhibit attached to plea to show the circumstances of defendant, which made the payment of $1 long in advance equal to $1.50 paid when service was rendered. The allegation of the plea that the less charge was in consideration of the Perdido Bay Lumber Co. furnishing defendant a great amount of business, if not proved clearly by the contract attached, is an allegation of fact which may, if denied, be proved by any competent testimony. There is certainly nothing in contract X. which proves that the P. B. Lumber Co. has not furnished a great amount of business. And the contract upon its face shows that only by furnishing a great amount of business to defendant could the P. B. L. Co. expect to be repaid the $10,000 advanced by it to defendant. Does the exhibit then so contradict the allegation of the plea as to neutralize it?

In view of the charge by plaintiff's attorney that defendant's attorney traveled out of the record in stating incidentally the paternity of contract X., and in justice to defendant's attorney, he invites the court's attention to the allegation in 5th plea as to this matter.

If plaintiff's counsel did deny in the court below the truth of the allegation in the plea, defendant's counsel did not hear the denial, and it certainly does not appear of record. He did hear an explanation of it, but understood the counsel to admit that he framed the contract, and he did not

deny that he occupied the position in the company which the plea allots to him.

These remarks are made to exonerate the defendant's attorney from the charge of traveling out of the record.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This writ of error is prosecuted here by James B. Johnson, the plaintiff in the Circuit Court. What he questions first, as a matter of practice, is the correctness of the ruling of the Circuit Court upon the demurrer to defendant's pleas. The defendant before filing its pleas had demurred to the declaration, and the court had overruled the demurrer. To the pleas then filed the plaintiff demurred, and the first question in the case to be determined is, does this demurrer reach the declaration, or, the declaration having been sustained by the court in overruling defendant's demurrer thereto, does this action of the court fix the law of the case, and, upon demurrer to the plea, prevent this court or the Circuit Court from going back to the declaration?

The plaintiff in error here maintains that it does, and insists that the only question is, admitting the declaration to be good, is this a good plea? The only case brought to our attention in this connection is the case of Ellison, Adm'r, vs. Allen, 8 Fla., 209. There this court held that a defendant in the Circuit Court, and appellant here, could not avail himself of his demurrer, abandoned in that court, by his pleading over when it was overruled.

We will state the principles of law controlling this subject as applicable to that case, as well as to this. Upon the interposition of the demurrer of the defendant to plaintiff's declaration, going as it did to the sufficiency in law of the matter stated as a foundation for the action, the judgment consequent upon the overruling the demurrer was a judgment *quod recuperet*. This was the strict common law rule.

(Tidd's Prac., 657.) This rule has been varied in most of the State courts, as well as in the courts of the United States. The general rule is now that even after the court has announced its judgment to be that the declaration is good in law, the defendant is permitted to withdraw his demurrer, to plead *de novo,* and thus avoid a final judgment against him. In this State the statute provides (act of Nov. 23, 1828, Thomp. Dig., 331,) that "no demurrer, either at law or in equity, shall be considered as an admission of the facts set forth in the pleadings demurred to, so as to debar the person demurring from any substantial claim or defence which he might have urged if said demurrer had not been filed," and the constant practice upon the circuit is, upon overruling a demurrer to a declaration, to permit the defendant to plead to the merits. When, however, he pleads to the merits he must withdraw his demurrer, and the consequent final judgment *quod recuperet,* which is the only known form of judgment which can follow overruling a general demurrer to a declaration, is not entered. This is the reason why a defendant, if he pleads over after judgment against him upon his demurrer to the declaration, is held to waive his demurrer. In such cases courts of error, controlled by the common law practice, treat the record as not containing any such judgment or demurrer—treat the case as if no demurrer had been filed. This, in view of our statute, is eminently just and proper. The statute takes from the plaintiff, so far as defendant's pleading is concerned, all advantage of the judgment in his favor upon defendant's demurrer to his declaration; and as to the defendant, it very properly provides that his case shall stand as "if said demurrer had not been filed." This is the reason why the appellant in the case referred to by the plaintiff in error here (8 Fla.,209,) was not permitted to assign for error the judgment of the court upon his demurrer. This court in that case says, if he desired to have that ruling reversed he should

have refused to go to the country, and have permitted the judgment on the demurrer to stand. The only authority cited by this court in that case for the view there announced was the case of the United States vs. Boyd, 5 How., 51. There the Supreme Court of the United States says, "The withdrawal of the demurrer and going to issue upon the pleading operated as a waiver of the judgment. If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings and have permitted the judgment on the demurrer to stand." The Supreme Court of the United States is somewhat more explicit in the language used in the later cases covering this subject. In the United States vs. Vigil, 10 Wall., 423, that court says, "The filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was thus abandoned and ceased thenceforth to be a part of the record." In Young vs. Martin, 8 Wall., 357, the same court, in speaking of this subject says, "They thus abandoned their demurrer, and it ceased to be a part of the record."

With this explanation and statement of the true grounds of this action of the court and of the Supreme Court of the United States, in cases where the plaintiff in error seeks to question a judgment of the court of original jurisdiction overruling a demurrer after he has plead over, we ask what is the result of its application here? The rule being that such a demurrer and judgment is, in contemplation of law, no part of the record, or if it is strictly a part of the record it is waived, then the general rule that upon plaintiff's demurrer to the defendant's pleas, the sufficiency of the declaration is brought in question must operate, for the simple reason that there is nothing to prevent its operation. The record stands as if originally there was nothing but the declaration, the plea and the demurrer thereto. Why should the defendant be held to have waived his demurrer, and the

plaintiff be given all advantage of it in the same manner as if not waived? How can it be held that a demurrer can be considered as withdrawn for one party and not for the other? The law has no such anomalies. If it is withdrawn it is withdrawn for all parties, and that is the end of it.

This, our conclusion, reasoning from elementary principles of pleading, is sustained, without exception, by the cases which we have been able to find covering the precise point. In Cumming vs. Gray, 4 Stew. & Port., 397, the Supreme Court of Alabama says, "That where a demurrer to a declaration containing no substantial cause of action has been overruled and the defendant pleads over, a second demurrer may well be extended back to the declaration." To the same effect are the cases reported in 13 Ala., 265, and 13 Ala., 490-500, and the like rule is announced by the Supreme Court of the United States in 7 Wall., 93. Our conclusion as to this point is that the demurrer to the plea reached the declaration, notwithstanding a previous demurrer to the declaration overruled, and that upon the argument of the demurrer to the plea, the record was to be treated in just the same manner as it should have been if no demurrer to the declaration was ever filed.

The next question in order in view of this conclusion is, do the facts set forth in this declaration constitute in law a cause of action?

The facts here alleged are that the defendant, a common carrier, compelled the plaintiff to pay to the defendant, between the first day of July, A. D. 1874, and the first day of March, A. D. 1877, fifty cents per thousand feet on 4,400,000 feet of lumber, shipped by plaintiff over said railroad, making an aggregate of $2,200 in excess of what the said defendant charged the Perdido Bay Lumber Company for like transportation over said railroad during the said period, between the first day of July, A. D. 1874, and the first of March, A. D. 1877.

Under the charter of this company it has the general power "to levy and collect tolls from all persons, property, merchandise, and all other commodities transported" on its road. There is no statute in this State regulating the matter of freights and charges by railroad companies. It is not denied that this company is a common carrier. We must, therefore, look to the common law for the settlement of the question involved.

The fact here stated is, that defendant compelled plaintiff to pay for lumber shipped over its road fifty cents per one thousand feet more than it charged another party for transporting lumber over its road at the same time, and the plaintiff insists that this difference of fifty cents was an illegal charge, and that he is entitled to judgment for $2,200, having been compelled to pay freight at that rate and in this manner on 4,400,000 feet of lumber.

The question here is, what was and is the extent of the obligation of a common carrier at common law to the public, when viewed in reference to charges for tolls and freights?

In Peck vs. North Staffordshire Railroad Company, decided in the House of Lords in 1863, (10 Ho. Lords cases, 511,) Mr. Justice Blackburn says: "A common carrier is bound to carry for a *reasonable remuneration.*" In one of the earliest cases upon the subject (Bastard vs. Bastard, 2 Show., 81,) it is said that "where there is no agreement as to price," (and this is really the best method by which to fix the common law right,) "the carrier might have a *quantum meruit* for his hire." This means simply that he could recover the value of his service. In Harris vs. Packard, 3 Taunt., 264, it is said: "A carrier is bound by law to carry everything which is brought to him for a reasonable sum to be paid to him for the same carriage, and not to extort what he will." We cannot say that the carrier is bound to carry anything beyond articles of such class as he is under a legal

obligation to carry, (3 Story, 34,) but it is unquestionably true that his charge must be "reasonable." So in Comyn's Digest we find it announced that in the absence of an agreement for a price certain, the common carrier may have a *quantum meruit*. 1 Com. Dig. C., citing 1 Sid., 36.

In the case of the Citizens' Bank vs. The Nantucket Steamboat Company, 2 Story, 35, Mr. Justice Story, speaking of the hire or recompense of common carriers, remarks that "it may be in the nature of a *quantum meruit*." The same view is announced in 5 Wend.,340,and in 5 Wend.,350.

Says Parke B., in Pickford vs. The Grand Junction Railroad Company, 8 M. & W., 378: "The carrier is bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded." In 2 Steph. N. P., 978, it is said "common carriers are bound to receive and carry the goods of the subject for a reasonable reward." In 1 Duval, 146, the Court of Appeals of Kentucky says: "A common carrier cannot, like a merchant or mechanic, consult his pleasure or caprice as to the conduct of his business. The law makes it his duty, when he can conveniently do so, to receive and carry goods for any person whatsoever for a reasonable hire."

Under the English decisions a warehouseman, having by virtue of an act of Parliament a monopoly of his business, is, as to rates of compensation which he can demand, placed upon the same footing as a common carrier. He is bound by law to receive goods into his warehouse for *a reasonable price and reward*. The principles which underlie this rule, as announced by Lord Hale, are stated by the English courts as the basis of their conclusions as to this matter. So in a case in the Supreme Court of the United States, (4 Otto, 134,) where it proposed to state the common law on the subject, the views of Lord Hale, and these decisions of the courts of England, are cited as giving the true rule.

In Allnut and another vs. Inglis, Treasurer of the Lon-

don Dock Company, (12 East, 527,) Lord Ellenborough says that according to Lord Hale, "wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods, which happen to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way; where the King or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either because they are the wharves *only licensed* by the Queen, or because there is *no other wharf* in that port, *as it may fall out;* in that case (he says) there cannot be taken arbitrary and excessive duties for cranage, wharfage, &c., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or charter." And then he assigns this reason, "for now the wharf and crane and other conveniences are affected with a public interest and they cease to be *juris privati* only." Lord Ellenborough then says: "Here the company's warehouses were invested with the monopoly of a public privilege, and, therefore, they must by law confine themselves to take reasonable rates for the use of them for that purpose." Le Blanc, J., in the same case, after stating that the act of Parliament confines the privilege to the company's warehouse, enquires: "Is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but only a reasonable rent?" and then answers his own enquiry by declaring that "in case of dedication to such a purpose as this" (that is, where private property is affected with such a public interest,) "the owners cannot take arbitrary and excessive duties, but the duties must be reasonable. That principle was followed up in the case of Bolt vs. Stennett, (8 Term Reports.

606,) for there the quay being one of the public quays licensed under the statute of Elizabeth, it was held that the owner was bound to permit the use of the crane upon it and could not insist either that the public should not use the crane at all, or should use it only upon his own terms, but that he was bound to permit the use of it upon reasonable terms." In the same case like views were expressed by Bayley, J.

It cannot be questioned that the reason why a common carrier is restricted to reasonable rates is the same that causes the limitation at common law upon the rates to be charged by a wharfinger licensed under a statute. (Munn vs. Illinois, 4 Otto, 129-30.) In reference to a railroad company it may be truly said that it exercises a *quasi* public employment. While railroads are managed for private benefit and the profits resulting from their operation go to individuals, yet they are treated as merely a public convenience and agency in the matter of State and inter-State commercial intercourse. It is the public character attached to them which, under certain circumstances, authorizes taxation for their construction, as a tax for a private purpose is unconstitutional; and it is the like public nature of their functions which enables them to become the objects of a legislative grant to take the property of an individual for their use, paying a reasonable compensation therefor.

We have exhausted the material at our hands in the endeavor to ascertain the result of the English cases upon this question. We can find in England or the United States no case involving the precise point here involved, which is, whether, at common law, the defendant, a common carrier, is responsible to the plaintiff for the excess charged him upon the like material and during the same time over a charge for like freights for like material during the same time made of another.

In the case of the Fitchburg Railroad Company vs. Gage

and others, (12 Gray, 393,) the Supreme Court of Massachusetts held "that a railroad corporation is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates." In speaking of the common law rule, that court says: "It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual *consists in the restricted right to charge in each particular case of service a reasonable compensation and no more.* If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint." The claim made in this case arose out of a difference between the freights upon plaintiff's ice and the price charged others upon the same *class* of freights. It was not upon the same material, but the court treated the case as involving the same principle. It based its conclusion upon the ground that the plaintiff did not set out a case of *excessive or unreasonable charge.* In the last edition of Story on Bailments, we find the rule of the common law thus stated: "At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis." In support of this doctrine the following cases are cited: 12 Gray, 393; 2 P. C., 237; 4 C. B., (N. S.) 78; 12 C. B., (N. S.) 74. While the text is the reasonable deduction from remarks in these cases, still, with the exception of the case reported in 12 Gray, they were (so far as we have been able to examine them) cases arising under statutes. Most of the cases treat of the common law rule strictly as between the parties, and without comparison as to the charges against others, the cases where legislative action is

being construed and is controlling, being omitted as not being in point. The cases stating the common law rule are simply that the charge must be reasonable. Thus far there cannot be any reasonable difference between fair minds. In the next place, the right to have the service of the common carrier at a reasonable rate is *common*. Upon a tender of a reasonable compensation, unless there is a reasonable ground for his refusal, in case of refusal he will be liable to an action. Under such circumstances he must receive and carry all goods offered for transportation (which it is his duty to transport) by *any persons whatever*, upon receiving a suitable hire. Looking to the cases, and rejecting as we always must *theories of judges* based upon ill defined definitions and outside of the facts before them, the term "common" in this connection is used as contra-distinguished to private or exclusive. It means a public carrier as distinct from a private carrier—a carrier simply *pro hac vice*. As to whether a carrier is public or private is the method by which you measure his responsibility. In case of loss or damage to goods by a carrier, the grounds of the difference of the responsibility depend upon whether he is a public or private carrier. The cases in England and the United States show that the term common as applied to carriers means simply *public* as distinct from *private*. The term common does not measure the extent of the right of each or its nature. It simply means that whatever is the right of one is the right of all, without proposing to define what is the right of any, except that the term common as applied to carrier involves the duty and obligation to undertake the service, while the term private as applied to carrier involves discretion in the matter. (2 Stephens N. P., 962.) Common carriers are "carriers for hire indifferently for all persons." "Those who are engaged in the business of carrying for all who apply, indiscriminately, upon a particular route, by whatever mode of transportation they conduct their busi-

ness, must be regarded as common carriers; while those who undertake to carry in a single instance, for a particular person, not being engaged in the business as a general employment, even for a portion of the time, must be considered private carriers." (4 Harr., 448; 1 Pick., 50; 2 Red. on Rail., 5 Ed., p. 5, and cases cited.) Says Chancellor Kent, "common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price." (1 Salk., 249; 8 Carr. and P., 207; 3 Barb., 388; 2 Kelly, 353.) Says Nisbet, J., (in the case last cited,) when treating of the distinctions between a common and private carrier: "If he refuse to carry he is liable to be sued and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character." Says Mr. Justice Story, (Story on Bailments, 495,) after speaking of his general obligations, "a common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place." (1 Wend., 272; 2 Story, 17; 25 Penn. St., 120.) In the last case the terms common and public are used as synonymous words. It is useless to multiply quotations to determine the signification of the term common in this connection. It is used not to define, to limit, or explain the degree or amount of compensation which can be demanded for the service to be performed. Indeed, as to the amount of compensation which can be demanded, the rule as to public and private carriers is the same. It is a *quantum meruit*. True, the responsibility, the risk of the public carrier is greater, and that fact may possibly enter into the estimate of the value of the service. That, however, would simply increase the damages, on account of the different degrees of responsibility attending the several bailments. It would not vary the rule.

Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A. and accommodate B.; that all, the entire public, have the right to the same *carriage for a reasonable price, and at a reasonable charge for the service performed;* that the commonness of the duty to *carry for all,* does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, *that for the service performed he shall charge no more than a reasonable sum to him;* that whether the carrier charges another more or less than the price charged a particular individual, may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. Where there is no express contract, the common law action by the carrier against the shipper is for a *quantum meruit,* and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person, (in this case the amount charged the Perdido Bay Lumber Company,) or the usual charge made against many others (the freight tariff) is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured *by the value of the service performed,* and not by what is charged another, unless what is charged the other is the compensating sum, in which event it is the proper sum, not on account of its *equality,* but because of the relation it bears *to the value of the service performed* as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not

charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of defendant here, by grant from the State. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge. A statement of inequality does not make a legal cause of action, because it is not necessarily unreasonable. It would be a strange rule indeed which would authorize a shipper, after being compelled to pay his freights according to established rates, (this appears from the pleas and declarations,) to look around and find some smaller charge for the same service during the same time, which may be either as a gratuity, or a sale of service at a non-compensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person. If this court sanctions the doctrine of absolute equality, and then measures the damages by the difference in the charge as to one person named in declaration, which does not negative a fair inducement or consideration for the difference, it must sustain such a rule as that stated.

The declaration, to be good in law, must state a case of excessive charge for the service performed. When it simply states a case of inequality of charge, it states no cause of action, for the smaller charge may be less than reasonable, and the greater charge may be exactly the value of the service and the reasonable charge for the transportation furnished.

Whether a charge made by A. against B. is reasonable cannot be determined by establishing the charge against C. for the same service. It is too plain for argument that the higher charge, where there is a difference, may be what is

the compensating sum, and the lower charge may be too small for the service.

In a case of this importance we do not deem it improper to review the cases brought to our attention by the plaintiff in error here. Our attention has been called to the following cases, decided by the Supreme Court of Illinois: The Chicago and Alton Railroad Company vs. The People, 67 Ill., 11; Vincent vs. Chicago and Alton Railroad Company, 49 Ill., 33, and Chicago, B. & Q. R. R. Co. vs. Park, 18 Ill., 460. The first case was an information in the nature of a *quo warranto* based upon the provisions of "an act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads for the transportation of freight on said roads." The question was whether a charge of $5.65 per thousand feet of lumber a distance of 110 miles, while at the same time the company charged $5 per thousand feet of lumber for a distance of 126 miles, did not subject the company to the penalties prescribed by the act. In answer to the information, the company alleged that the higher charge for the shorter distance was a reasonable charge, and that the smaller charge was unreasonably low. Upon demurrer to this answer or plea, the court held that notwithstanding the charter of the corporation was a contract giving general power to prescribe tolls, the Legislature had power to prohibit unjust discriminations; that it did not have the power under the Constitution to prohibit any discrimination, and that "the naked fact that a railway company charged a larger sum for transporting freight of the same class over a given distance than it is charging for the same distance over another part of its road, or in the opposite direction, is not of itself conclusive evidence of an unjust discrimination," and "that a difference of price for the same distance of transportation is not necessarily an unjust discrimination." In the case reported in 49 Ill., the court decided that railroad companies were not at liberty

to discriminate at their discretion in their charges for delivery at different warehouses. The case reported in 18 Ill., 466, was a claim by a passenger for damages for an alleged illegal expulsion at a place not a station. In the later cases in Illinois we find the question of discrimination discussed. In 76 Ill., 67, the court sustained a contract allowing a rebate of 5⅛ cents less than the uniform tariff per bushel for corn. In 79 Ill., 121, the question of the power of a railroad company, *anterior to this legislation,* to make a contract with a party "for transportation of freight at a less rate than the general public was required to pay," was sustained. The agreement was to transport coal for $3 per car load, the freighter furnishing the cars, while the regular tariff was $9. We do not think the question of equality was involved in any of the Illinois decisions brought to our attention by counsel. The later cases sustaining a difference (76 and 79 Ill.) in the amounts paid for freight, we think are entitled to more consideration. The case reported in 76 Ill. was upon a contract made before any of the legislation against unjust discrimination. The rule for its determination was the common law. It is, therefore, more like this case, and what is there said is entitled to more weight. We consider the other cases cited.

The case reported in 57 Maine, 188, was where a railroad company refused to carry the plaintiff's express freight. The case reported in 52 N. H., 430, was upon a statute requiring that "all persons shall have reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of any merchandise," &c. In speaking of the rule of the common law upon the subject as stated by the English courts, the Supreme Court of New Hampshire in this case says: "We have not overlooked the fact that in England it seems to be supposed that at common law common carriers are not bound to carry all and for all on reasonably equal terms,"

and that "the fact seems now to be overlooked" (by the English courts) "that the general principle of equality is the principle of the common law." "A mistake of this kind is an evil of some magnitude." This case is under a statute. Not only is this true, but we cannot accept the reasoning of this court, based upon no authority, founded in decisions involving the points discussed, as against what it admits is the rule as announced by the English courts. The English courts announce the rule as it is fixed by the common law cases cited in the beginning of this opinion. The New Hampsaire court fails to pay any attention to these sources of information, and calls the conclusions therefrom a mistake. We think the dictum of the New Hampshire court wrong, and the doctrine of the English courts right.

The case in 68 Penn. St., 370, did not involve the question of equality of charges for transportation. It involved a right of wharfage. The court held that the nature of wharfage required exclusive possession. The case reported in 24 Penn. St., 378, was under the statute incorporating the company, and the court held that under this statute a contract giving to one express company an exclusive right of transportation in the passenger trains was illegal and void. The case cited from 24 La. An., 1, is against the plaintiff. It approves the decision in 12 Gray, 399.

In the case of Messenger, et al. vs. Penn. R. R. Co., 7 Vroom (N. J. L.) 407, it was held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others is void, as creating an illegal preference. The declaration in the case before us does not make a case of charge for carriage greater against the plaintiff, *under the same conditions,* than a smaller charge was made of the Perdido Bay Lumber Company. It simply sets up that 50 cents per thousand feet of lumber was charged plaintiff beyond what was charged the Perdido Bay Lumber Company

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was charged the Perdido Bay Lumber Company

for transportation for lumber at the same time. Nor is there any sanction in this case in New Jersey for the idea that the damages are to be measured alone by the extent of the inequality in the charge. Indeed, in this very case the court say that "the duty of the common carrier was to receive and carry all goods offered for transportation, upon receiving a reasonable hire." This case in New Jersey is to the effect that it is not "admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions." The declaration in the case before us does not make this case. It makes a case of difference in charge upon the same kind of freight (lumber) during the same time. The amount of freight to be furnished by the parties may have been different, and there may be other circumstances so unlike in character (*in re* Baxendale vs. The G. W. R. R. Co., 94 E. C. L., 308,) as to control. Independent of these questions, however, the common law rule as we understand it, and we ascertain it by looking to the elementary principles as announced by the English and American courts, and not from any process of reasoning as to what the rule, in our judgment, ought to be, does not require an equality of charge, but only a reasonable charge in view of the service which the party gets and the carrier renders. From the very earliest English cases the measure of the right of the carrier was a *quantum meruit*. The carrier *must receive this if tendered, and must* (with certain defined exceptions) *perform the service,* and the shipper must pay the value of what he gets. Whether as an internal State regulation of commerce equality should be required by the Legislature, is a matter of legislative discretion; at least this court can only enforce the rule of common law as it finds it, and not as it ought to be. Even as to the power of the Legislature in the premises, however, we say nothing in this case, as it is not involved.

Our conclusion is that the declaration does not contain a legal cause of action, and that the demurrer to the pleas of the defendant reached the dcelaration,notwithstanding a previous demurrer to the declaration by the defendant had been overruled. The judgment must be affirmed.

LAWRENCE G. MAYO, APPELLANT, VS. E. S. HYNOTE FOR THE USE OF FORCHEIMER & CO., APPELLEES.

1. A bill of exceptions was settled and signed by the Judge on the 29th day of May, 1878, as of the 4th day of May, 1878, the 29th being beyond the time allowed by the special order of the court within which to make such bill of exceptions, and the 4th within such time. No laches existing on the part of the appellant, the bill having been placed in the hands of the Judge for signature within the time, and the cause having been brought into and heard by the Appellate Court at the first term thereof after the judgment: *Held*, That in a case of this character, controlled entirely by the rules of the court, the court will consider the circumstances surrounding it, and in this case will consider the bill of exceptions as properly here.

2. It is the province of the jury to determine questions of fact, and when the evidence is conflicting and there is no question of credibility of witnesses, this court will not interfere unless it appears that the jury were influenced by some improper motive.

Appeal from the Circuit Court for Santa Rosa county.

There is a sufficient statement of the facts in the opinion of the court.

C. C. Yonge for Appellant.

G. G. McWhorter for Appellees.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action of trover to recover the value of cer-

tain square hewn timber, which Forcheimer & Co. claimed to be the owners of, alleging that the defendant Mayo had converted the same to his own use. The defendant plead not guilty, and claimed that the plaintiffs below were not the owners of the property.

The cause was tried at the October term of the court for Santa Rosa county before a jury, and a judgment was entered on the 16th day of that month in favor of the plaintiff for the sum of four hundred dollars. The defendant moved for a new trial, which motion was denied. He then brought his appeal to this court. The errors assigned are—first, the verdict of the jury is contrary to and against the weight of evidence; second, the verdict was against the law and the charge of the court.

On the argument of this cause it was suggested that the bill of exceptions was not signed by the judge who held the court within the thirty days mentioned in the order made by the court on the trial of the cause, and that, therefore, it was not properly a part of the record and should not be considered.

Rule 98 of the Circuit Court in common law actions, provides that "the bill of exceptions shall be made up and signed during the term of the court at which the verdict is rendered or trial had, unless by special order further time is allowed. In case such special order is made it shall be entered in the minutes, and in making up the bill of exceptions the fact that such an order was made shall be mentoned therein, or shall otherwise appear in the record."

The record shows that this rule was complied with; that on the 15th day of April, 1878, when the motion for a new trial was denied and judgment ordered for the plaintiff, the court made an order which was entered in the minutes giving to the appellant thirty days to "propose a bill of exceptions." The bill itself shows that such special order for time was made, and that on the 4th day of May thereafter, with-

in the thirty days granted by the order, the proposed bill was presented to the judge and he was requested to sign the same. The bill is signed by the judge "this 29th day of May, A. D. 1878, as of said 4th day of May."

The appeal bond was filed on the 9th day of May. The party had been guilty of no laches; his bill was in due time presented to the judge for settlement and signature; his appeal bond was filed, and this is the first term of this court at which, by any possibility, he could have been heard. The delay, if any, was occasioned by the absence of the judge in the performance of his official duties. Had the judge refused to sign and settle the proposed bill when requested, the statute provides a method by which it might have been perfected. Thomp. Dig., 37.

If the delay was occasioned by neglect or other cause except refusal, the object could be accomplished by mandamus. High's Legal Remedies, §220; Lane vs. Robinson, 40 Ga., 467; Board of Police vs. Ray, 20 Miss., 342.

If either one of these proceedings had been resorted to the bill could not have been settled, probably, within the thirty days allowed by the order. No time has been lost, and neither party has been injured. We hold that the bill is a part of the record and properly here. No exceptions appear to have been taken to the introduction of any of the evidence upon the trial, or to any portion of the charge of the court to the jury. Such evidence was conflicting without any question as to the credibility of witnesses, and it was peculiarly the province of the jury to determine the question of fact submitted to them. We have frequently held that in such case this court will not interfere, unless it appears that the jury were influenced by some improper motive. Godwin vs. Bryan, 16 Fla.; Coker vs. Merritt, ibid.; Sullivan vs. State of Florida, ibid.

The judgment is affirmed.

FORCHEIMER & CO., APPELLANTS, VS. LAWRENCE G. MAYO, APPELLEE.

Where a question of fact is determined and settled by a jury, upon conflicting evidence, and there is no charge or suggestion of undue influence upon, or improper motives affecting the jury, this court will not reverse the finding.

Appeal from the Circuit Court for Santa Rosa county.

There is a sufficient statement of the facts in the opinion of the court.

G. G. McWhorter for Appellants.

C. C. Yonge for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action of replevin, brought by Forcheimer & Co. against Mayo, to recover 222 pine saw logs. The cause was tried before a jury, and the verdict was for the defendant.

Plaintiffs moved for a new trial, upon the ground that the verdict was contrary to the evidence and the law. This motion was denied, and judgment against the plaintiffs for costs was awarded. From this judgment the plaintiffs bring their appeal.

No exceptions to the rulings of the court on trial, or to the charge to the jury were noted. It was a question of fact as to which of the parties were owners of the property. The evidence was conflicting, and the jury have determined the question. There is no suggestion of undue influence upon, or improper motives influencing the jury.

Upon the same principles and rules which control the decision in the case of Mayo, appellant, against Forcheimer

& Co., appellees, decided at this term, this judgment must be affirmed.

SIMPSON & CO., APPELLANTS, VS. JOHN T. DANIELS, APPELLEE.

1. A verdict that "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876," expresses sufficiently the intention of the jury; the time for which such interest is to be computed and the rate are fixed. The clerk can make the necessary calculation and embody the amount in the judgment.

2. The court will not reverse a judgment founded on the verdict of a jury for the sole reason that immaterial evidence was admitted by the court, when it is apparent that such evidence could not have influenced the jury in forming their verdict.

3. A cause will not be remanded simply for the reason that there is a small excess in the amount of damages awarded by the verdict. The jurors are the proper judges from the evidence as to the amount to be awarded, and where the evidence will uphold the verdict, this court will not interfere.

4. A party applying for a new trial upon the ground of newly-discovered evidence "must make his vigilance apparent," and the evidence so sought to be introduced must not be cumulative.

5. D. brought his action against S. to recover damage sustained by reason of S's. negligence to one hundred and one pieces of hewn timber. On the trial it appeared that one D. S. was jointly interested with the plaintiff in twenty-one pieces, and that P. was also jointly interested with plaintiff in thirty-two pieces. The jury found for the plaintiff and assessed his damages as sustained on the whole one hundred and one pieces. The defendant S. moved for a new trial, and the plaintiff D. having, before judgment, remitted the average damages on the fifty-three pieces in which D. S. and P. were interested, the motion was denied, and judgment ordered for an amount equal to the average of the damage sustained by the plaintiff D. on the timber owned by him alone: *Held*, to be no error, the evidence showing the timber to be of like quality and value, and the damage having been calculated and arrived at by an average of the whole.

Appeal from the Circuit Court for Santa Rosa county.

John T. Daniels, the plaintiff, brought his action in Santa Rosa Circuit Court against Richard M. Bushnell, James Creary, E. H. Roberts, Henry T. Wright, John Adams, Benjamin Overman, and Susan A. Simpson, partners in business under the name of Simpson & Co.

The declaration alleges that the plaintiff had a large lot of hewn timber and saw logs in the Blackwater river, a navigable stream free to the use of the public, for the purpose of transportation to market; that the defendants were also desirous of transporting logs and timber to market down the same stream, and proposed to the plaintiff that if he would cove his timber and logs for a short time out of the main channel of the river, they would then give him a clear river for his transportation; that he proceeded to cove his timbered logs under this arrangement, and the defendants took possession of the stream, obstructed it with logs and booms, and thus kept plaintiff's timber and logs back for two years, by means whereof it became greatly depreciated in value, and that he was thereby injured and damaged to the amount of four thousand dollars.

One other count in the declaration charged the defendants with obstructing the Blackwater river, a navigable stream, so that plaintiff was prevented from getting his timber and logs to market for a great length of time, whereby the timber was depreciated and the market value was reduced.

The third count alleged that the defendants had wrongfully taken and converted to their own use two hundred hewn timber logs and five hundred saw logs of the value of four thousand dollars, being the property of the plaintiff.

The defendants deny that the Blackwater river is a navigable stream by the laws of Florida, and they deny that they made any agreement as is alleged by the plaintiff in the first count of his declaration; they also deny that they ever obstructed the Blackwater river, but allege that being en-

gaged in the manufacturing of lumber they have from time to time purchased logs on said river; that the stream is so narrow that it is impossible to float logs down it, except when swollen by rains; that they have at all times, as soon as it became possible to float logs, promptly and energetically endeavored, with a large and competent force of men, to float their logs out of the stream; that by proper attention and diligence the plaintiff could have got out his logs earlier than he did; that they, the defendants, offered to drive the plaintiff's timber and logs cheaper than he could get any one else to do it, which offer was declined; that plaintiff never used any diligence, and that any damage he sustained was through his own inattention and négligence; that they never converted to their own use any of the timber and logs as is alleged in the plaintiff's declaration.

Such further proceedings were had that the cause came on to be tried by a jury on the 10th day of April, 1878, who found for the plaintiff as follows: "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876."

The court then ordered judgment against the defendant for the sum of eighteen hundred and seventy-nine dollars and sixty-six cents, besides costs. The counsel for the defendants then moved for a new trial upon the following grounds:

1. Verdict was contrary to law.
2. Verdict was contrary to the evidence.
3. Verdict was contrary to the charge of the court.
4. Verdict gives to plaintiff excessive damages.
5. The court erred in admitting the evidence of S. S. Howell as to threats of Edward Jernigan.
6. Since the trial of said cause defendants have discovered new evidence which, if it had been known by them and introduced at the trial, would have materially affected the verdict of the jury.

7. The verdict of the jury is erroneous in allowing interest on the verdict from September 1st, 1876.

8. The court mistook the law as to the existence of a partnership between plaintiff and Sweeney and plaintiff and Pitts.

The court denied the motion for new trial, and made the following order:

"On motion for a new trial, it is ordered that upon a remittitur being entered by the plaintiff for interest found by the verdict, ($217.26) and proportional value of the twenty-one of the one hundred and one pieces of timber in controversy, alleged to be the property of John T. Daniels and Darly Sweeney as partners, and the proportionate value of thirty-two of said one hundred and one pieces of timber, alleged to be the property of John T. Daniels and Thomas J. Pitts as partners, aggregate of said remittitur being $1,347.66, and the plaintiff having entered a remittitur for said amount, without prejudice to his right in the premises, the motion for a new trial is denied."

To this order the defendants excepted. Judgment was then entered for five hundred and thirty-two dollars, besides costs. From this judgment the defendants appeal, and assign the following errors:

1. The court erred in admitting the question to witness Howell as to declarations by Jarnegan as to booms.

2. The verdict of the jury was for excessive damages.

3. The court should have granted a new trial on the ground of newly-discovered evidence.

4. The court erred in assuming that the damage to the three lots was equal and proportionate.

G. G. McWhorter for Appellants.

C. C. Yonge for Appellee.

MR. JUSTICE VANVALKENBURGH delievred the opinion of the court.

One of the grounds urged by the defendants for a new trial before the court below was that the verdict of the jury was erroneous in allowing interest on the assessed damages from the first day of September, 1876. We think there is no error in this, the damages were assessed by the jury at the sum of sixteen hundred and sixty-two dollars and forty cents, the computation and addition of the interest was simply a mechanical act, and could be computed and added by the court or clerk. There was no question as to the rate of interest, it was to be by the very terms of the verdict "legal interest," a rate fixed by the laws of the State. This question has been settled by this court in the case of Schultz vs. the Pacific Ins. Co., (14 Fla., 73.) In that case the court say: "There is no difficulty in the clerk calculating the interest from the date of the commencement of the suit to the date of the verdict; the periods are fixed by the verdict; there is no difficulty as to the rate; there were no issues in respect to interest."

In this case under consideration the periods are fixed "from the 1st of September, 1876;" the rate is fixed and there is no uncertainty as to the intention of the jury. This question is not, however, presented in the assignment of errors on file; the amount of such interest having been remitted by the plaintiff under the direction of the court before the final judgment was entered. See also Page vs. Cady, 1 Cowan, 115.

It is assigned for error that the court admitted a question to the witness Howell as to declarations and threats made by one Jarnegan as to booms on the Blackwater river. Howell was a witness introduced upon the part of the plaintiff. In answer to a question he testified that "Ed. Jarnegan was in charge of defendants' log drives and

booms." He was then inquired of if Jarnegan had made threats against any one who should interfere with the booms. The counsel for the defendants objected to this question because it was not shown at what time the threats were made, or that they were within the scope of the agent's authority.

The court overruled the objection, and the counsel for the defence excepted. The witness then answered that Jarnegan "said that any person he caught opening the booms would suffer."

We are of the opinion that to warrant the introduction of threats upon the part of an agent to bind the principal more proof of the agency than was given is necessary, but in this case that question is not important; the evidence was immaterial; the threat amounted to nothing; the booms had not in any degree prevented the plaintiff from getting his timber and logs to market; there was no complaint by the plaintiff that the booms obstructed his navigation of the river, but on the contrary he had already on his cross-examination testified that he "never was prevented from running his timber down by defendants' booms to his knowledge." Who should better know that fact than the plaintiff himself?

The evidence not being material, it is impossible to see how it could influence the jury in their consideration of the issues presented to them, or in any way affect their verdict. The court will not interfere with the finding of a jury for the sole reason that immaterial evidence has been introduced, when it is apparent that such evidence could have no influence on the jury in making up their verdict. Flint vs. Rogers, 15 Me., 67; Flanders vs. Davis, 19 N. H., 139.

The next error assigned is that the damages are excessive.

The declaration contains six counts, the first upon an alleged agreement by which the plaintiff was to cove his timber and logs temporarily, while the defendants drove or

floated their logs down the Blackwater river out of the way, they then giving to him "in a short time" a clear river for the transportation of his logs and timber on the stream to market. The plaintiff claims they did not fulfill this agreement, but by reason of their not clearing the river for a year or more his timber, and logs were damaged in value, the market price fell, and he lost a large amount when he finally succeeded in disposing of them in the market.

The second count, while not setting up an agreement between the parties, alleges that defendants obstructed a navigable stream, so that plaintiff was prevented from transporting his timber to market on said stream for a great length of time; that by such delay the timber became of less value, and the market became greatly depreciated, causing large damage to plaintiff.

The third count alleges that the defendants became possessed of, and converted to their own use, timber and logs, the property of the plaintiff, of the value of four thousand dollars, to the damage to the plaintiff of that sum.

The fourth, fifth and sixth counts were for goods, wares and merchandise sold and delivered by plaintiff to defendants, for money had and received by the defendants for the plaintiff, and upon an account stated between them.

The evidence introduced on the part of the plaintiff showed that he had one hundred and one pieces of hewn timber in the river, averaging about one hundred and forty feet, and worth in all about three thousand dollars; that when he sold it he got six hundred dollars for it. This was plaintiff's own evidence. Hinote swears that "there was about one hundred pieces of the timber; it was over a hundred foot average; it was sound timber, worth about twelve cents for hundred foot average."

The evidence was thus before the jury. There was no conflict; if they took the evidence of the plaintiff Daniels,

the timber was worth from twenty-four to thirty hundred dollars; if they took the evidence of Hinote, who was not as particular as to the number of pieces or average, it would be considerably less in value; whatever proof they relied upon in calculating the amount of their verdict, it is evident that they deducted the sum of six hundred dollars which was received by plaintiff on the final sale of the timber, and rendered a verdict for $1,662.40 with interest. Had the plaintiff been entitled to recover for damage sustained by reasons of the obstructions and decay of all the timber, as complained of, we are not prepared to say that this verdict was excessive.

It was a question of fact, and the jury have figured it out. They knew, saw and heard the witnesses; they were acquainted with the locality, and could much better appreciate the weight to be given to the evidence than we can upon the record. It is not in every case that a cause will be remanded, simply for the reason that there is a slight excess in the amount of the verdict. It is difficult to tell precisely the weight which will be given by a jury to certain evidence. What operates with one may have no effect upon another, and where the evidence will uphold a verdict, the court will be slow to interfere with the finding of a jury. Milton vs. Blackshear, 8 Fla., 161.

The third error assigned is in not granting a new trial, on the ground of newly-discovered evidence.

In support of the motion the counsel for the defendants read an affidavit made by E. H. Roberts, one of the defendants, which is in the words following: "E. H. Roberts being sworn, ind due form of law, deposes and says that since the trial of the case of J. T. Daniels vs. Simpson & Co., they, the defendants, have discovered new testimony, which, if it had been known to defendants they could make and had been introduced to the jury, would have materially affected their verdict; that the said evidence is this:

'that he expects to prove by one Bart Blackman that a part of the timber claimed as belonging to plaintiff, and as sound by him, was seen and inspected by Blackman in the woods before it was hauled; that he looked at it with a view to haul it, and that it was damaged then; that affiant did not know of this evidence until since the trial of said cause, and that affiants have used every endeavor to obtain evidence bearing on the issues involved in the case.'" This affidavit, unsupported by any other evidence, does not warrant the granting of a new trial.

No sufficient reason is given for not producing the evidence on the trial of the cause before the jury. The party making application for new trial must not only show that the knowledge of this evidence had come to him since the trial, but he must show that it is not through the want of diligence that it did not come to him sooner. It is no sufficient proof of diligence in this respect to assert in his affidavit that "the defendants have used every endeavor to obtain evidence bearing on the issues involved in the case." Something more positive showing diligence, must be asserted. But were a new trial to be granted, there is no proof that Blackman would testify "that he looked at the timber with a view to haul it, and that it was damaged." Roberts only swears that he "expects to prove" this fact by one Bart Blackman. Where is the affidavit of Blackman, and how much was the timber damaged?

If this evidence could be produced on another trial, his affidavit might have been procured to have been used on this motion, and the court then would have been in a position to determine the value of his evidence. But this evidence when produced would have been simply cumulative, and, therefore, the motion should not have been granted on this ground.

The plaintiff, in making out his case, introduced evidence to show that the timber was sound when it was put into the

water. Hynote swears it was sound; Thomas J. Pitts testifies that the timber was in good order; the plaintiff on his cross-examination, in answer to a question put by the defendants' counsel, says, "It was not sap damaged when coved." It would seem also from the evidence of Sweeney, one of the witnesses introduced by the defendants, that this alleged damage to the timber before it was put into the creek was attempted to be proved by them. He says "some of the Daniels timber was damaged before it was coved, but after it was put in the creek."

It is now well settled that a party applying for a new trial, on the ground of newly-discovered evidence, must make his diligence apparent; that such evidence must not be cumulative, but must relate to facts upon which there was, upon the part of the moving party, no evidence on the trial. Milton vs. Blackshear, 8 Fla., 161; Coker vs. Merritt, 16 Fla.

The last error relied upon is, that the court, in directing a remittitur, erred in assuming that the damage to the three lots of timber was equal and proportionate.

The jury found a verdict for plaintiff for the sum of $1,662.40 with interest, which was subsequently computed by the court and amounted to $217.26, making the whole amount recovered by the plaintiff $1,879.66. On the motion for new trial the court made an order that in the event of the plaintiffs remitting the interest so allowed by the jury, and the proportionate value of the twenty-one of the one hundred and one pieces of timber, alleged to be the property of Daniels and Sweeney as partners, and the proportionate value of thirty-two of said one hundred and one pieces of timber alleged to be the property of Daniels and Pitts as partners, the amount so to be remitted, including the interest being $1,347.66, the motion should be denied. Such remittitur was entered by the plaintiff, and the judgment was ordered for $532.

The appellant makes no question as to the authority of the court to order a remittitur; therefore that point is not before us for consideration.

The only question is, did the court err in assuming that the damage to the three lots of timber was equal and proportionate?

The evidence as to the length, quality and value of the timber, and the depreciation by decay and depression of the market, was directed entirely as to the *average* of the timber. No witness designates any portion of the whole lot as injured by the delay more than another. It seems to have been put into the creek about the same time, and to have been of about the same value in all respects. The plaintiff was a part owner in all of it, but Sweeney was proved to have been interested in twenty-one pieces, and Pitts in thirty-two. The court directed that the average value of these fifty-three pieces, as proven by the witnesses and found by the jury, should be remitted.

We cannot see that the court erred in this particular, and the judgment must be affirmed.

M. N. DICKSON, APPELLANT, VS. L. M. GAMBLE, APPELLEE.

1. A note whereby the maker promises to pay a sum of money "for value received on account of taxes on the property of the estate of L. and others for the year 1872," does not give a right of action to the payee, as the law does not recognize this mode of collecting taxes, and there is no allegation in the declaration that payee had paid the taxes for or at the request of the maker.

2. A tax-collector cannot enforce a note given him for taxes which it is his duty to collect, particularly as it is not alleged that he paid or discharged the taxes mentioned at the request of the maker.

3. Whether the publication of the list of lands advertised to be sold for

unpaid taxes by a collector creates the relation of debtor and creditor as between the collector and the publisher, *quere?*

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

J. F. McClellan for Appellant.

THE CHIEF-JUSTICE delivered the opinion of the court.

This suit is brought to recover a balance due on a note, of which the following is a copy:

"$503.95. MARIANNA, FLA., April 8, 1873.

On or after the 8th day of April, A. D. 1873, we, or either of us, promise to pay to the order of L. M. Gamble the sum of five hundred and three 95-100 dollars, for value received, on account of taxes for M. N. Dixon, ex'r estate of F. H. G. Long and other's property for the year 1872.

(Signed) FRANK BALTZER,
M. N. DICKSON.

Credited by $369.84, paid March 6, 1874, to L. M. Gamble."

To the declaration the defendant pleaded payment, and further that the note was obtained from him by fraud in this, "that this defendant was indebted to plaintiff in the sum the note calls for for State and county taxes; that he reduced the amount to a currency basis and paid said amount to Frank Baltzell, the joint maker, at the request of the plaintiff, plaintiff and Baltzell then and there representing that the said plaintiff was then indebted to Baltzell in an amount more than sufficient to pay off and liquidate the note, and that when plaintiff and Baltzell settled, the note would be taken up and paid off by said indebtedness of plaintiff to Baltzell." Which said pleas were denied by plaintiff.

The defendant then filed another plea and says: "For an equitable defence to the cause of action sued upon," that at the date of the note he was the executor of the will of F. H. G. Long, deceased, and that he was owing for the taxes for 1872 upon that estate and the taxes of Nicholas Long, and of himself and others in Jackson county the sum of $503.95; that plaintiff was the collector of revenue for Jackson county; that he went to plaintiff to pay these taxes and ascertain what amount thereof was payable in United States currency, and State and county scrip being at a discount, they ascertained what amount of currency was necessary to purchase the amount of scrip required to pay the taxes payable therein, and found the whole amount of currency required to pay the whole was $369, or about that sum; that when in the act of paying this amount to plaintiff, Frank Baltzell requested the plaintiff to let him have the $369, Baltzell agreeing that plaintiff should withhold the amount from him out of any money due or to become due from plaintiff to Baltzell as publisher of a newspaper, on account of the publication of tax sales for plaintiff, to which plaintiff assented, provided that Baltzell would give plaintiff his note for the whole amount of said taxes with defendant as security, and defendant to be responsible therefor only in the event that Baltzell should die, or his office be burnt, or the publication of his paper be suspended before he had published the advertisement of tax sales, out of which publication of tax sales plaintiff was to be paid by Baltzell the amount of the taxes defendant was liable for and had agreed to pay, whereupon defendant paid over to Baltzell the $369, and thereupon the said note was given; that Baltzell did not die, his office was not burnt, nor was the publication suspended during the time of advertising the tax sales for the plaintiff, wherefore the defendant did not become liable to pay this note.

The plaintiff replying denied this plea, and the cause

having been tried, the jury returned a verdict for plaintiff for $168.43. A motion for a new trial was denied and judgment rendered, from which defendant appeals.

It was proved that plaintiff was the collector of revenue in 1873 as stated in the plea, and that the note was given for the amount of certain taxes.

If there is a good ground of action set out in the declaration, it is certain that this plea of an "equitable defence" is insufficient to resist a recovery. The ground of defence, according to this plea, seems to be that it was understood and agreed at the time the note was given that if Baltzell did not die, or his printing establishment was not burnt out, or if he did not suspend the publication of his newspaper before the publication therein of the "tax sales;" in that case the defendant was not to be held liable on his note.

This is not an "equitable defence," but is purely a legal defence, if a defence at all, for it is alleged to have been part of the same transaction. To have made this condition available as a legal defence, it should have been so expressed in the note or in some collateral writing, otherwise it cannot be proved without violating the rule that in a court of law the terms of a written contract cannot be varied by parol proof. A collateral agreement by which a simple contract debt may be *discharged* or *paid* in a particular mode, provided the condition is complied with, may be shown in satisfaction, and for this purpose parol evidence may be given of the cotemporaneous agreement. Chaddock vs. Van Ness, 35 New Jersey, 517; Greenleaf Ev., §302; 2 Sneed, 438.

In Dobson vs. Pearce, 2 Kernan, 156, it is said referring to the provisions of the code, "under the head of equitable defences are included all matters which would before have authorized an application to the court of chancery for relief against legal liability, but which at law could not have been pleaded in bar." See also Wodehouse vs. Farebrother, 30 Eng. Law and Equity Rep., 412.

But this is a matter of legal and not merely equitable defence; it grows out of a distinct though contemporaneous contract which does not change the terms or meaning of the writing.

Neither does the "equitable" plea set up that Baltzell had done any advertising of tax sales for the plaintiff, or that any thing had become due to Baltzell for any such advertising which plaintiff could apply on the note. Whether the advertising of lands for sale for taxes by a publisher is done under such a contract between the tax collector and the publisher, or between the State or county and the publisher, and whether the collector can control the compensation of the publisher with reference to such an agreement as is here alleged, so as to apply the compensation to the payment of the publisher's debt, is a question not necessarily raised at this time. The question is presented, however, whether the plaintiff shows by his declaration that he has a cause of action, and is entitled to recover against the defendant upon the note in question. The note is upon its face an agreement to pay the plaintiff a certain sum for taxes, or "for value received on account of taxes," upon the property of certain persons named.

It is difficult to conceive how defendant can owe any taxes to anybody other than the State, county, or a public corporation. The law does not authorize the individual collector of taxes to sue for them in his own uame. The declaration does not allege that the plaintiff, at the request of the defendant, had paid or discharged the taxes, but the agreement sued on is to pay the plaintiff certain taxes. This is not a legal cause of action, and a judgment upon this instrument alone cannot be sustained. There must be other allegations and proofs than of a mere promise to pay taxes. It is shown by the pleas and by the testimony of the plaintiff that the plaintiff was the collector of revenue of Jackson county. We know of no law authorizing the collector to take

notes of individuals in satisfaction of taxes and to collect them by suit upon such notes.

If, however, he paid or discharged these taxes at the request of the defendant, that may explain the transaction and present a question that does not arise under the bill of particulars filed in this case.

The judgment must be reversed with costs, and the cause remanded with directions that the parties may amend their pleadings as they may be advised.

PITTMAN'S ADMINISTRATOR, PLAINTIFF AND RESPONDENT, vs. REBECCA L. MYRICK, DEFENDANT AND APPELLANT.

1. Where there is an entire failure to state facts sufficient to constitute a cause of action, in a complaint under the Code, a failure to demur is not a waiver of such defect, but advantage can be taken of it at any stage of the cause.

2. It is a recognized doctrine that an Appellate Court may look beyond the bill of exceptions, and consider vital errors apparent on the face of the record, as where the complaint clearly shows that a right of action in the plaintiff does not exist.

3. R. L. M. and F. R. P. were administratrix and administrator of the estate of J. T. M., and F. R. P. being desirous of leaving the State, and of being relieved of the duties and responsibilities of administering, it was agreed that he should surrender the assets to her and she should give him a bond of indemnity, and she with a surety executed to him a bond, which, after reciting the circumstances, concluded with the condition "that if the said R. L. M. shall pay the above claims, [enumerating several claims against the estate in behalf of third parties,] as the same shall be just and proper, and hold the said F. R. P. harmless and forever discharged from said debts or demands, and all other debts or demands that may be brought against said estate, and against all claims and demands of whatever character that may be brought or protested against F. R. P. as administrator as aforesaid, then," &c.; and the alleged breach of the condition was that she had refused to pay a debt of the intestate due to the estate of one H., of

which the said F. R. P. was administrator: *Held,* That this was a bond of indemnity only as to all claims against the estate of M. which were not due to F. R. P. in his own right, and not a bond upon which he could recover against her claim due to others; and that he could allege a breach only after his liability growing out of the administration of the estate of M. had been ascertained; that the bond created no new personal obligations to pay the debts, beyond the available assets of the estate of her intestate.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

Geo. S. Hawkins and *J. F. McClellan* for Appellant.

D. L. McKinnon and *W. H. Milton* for Respondent.

THE CHIEF-JUSTICE delivered the opinion of the court.

This case was commenced under the late Code. Rebecca L. Myrick (widow of John T. Myrick) and Frederick R. Pittman were administering upon the estate of John T. Myrick, deceased, in Jackson county, Florida, in 1868, when Pittman being desirous of going to California and of being relieved of the responsibilities of administering, and having in his hands a considerable amount of the personal assets of the estate, and so that he might be held harmless against the claims which had been or which might be presented against said estate, and she being anxious to obtain control of the estate, believing she would thereby be benefited, she, together with one Joseph W. Russ as her surety, entered into a bond to Pittman in the penal sum of five thousand dollars, with the conditions annexed: That whereas, Mrs. Myrick had applied to the court for the setting off of her dower in the estate of her husband, and it appearing that there is not sufficient property or assets in the hands of the administrator and administratrix to satisfy the debts or demands and her dower interest; and whereas, some of the debts have

been settled by them, and there are outstanding the following claims, to wit: "claim of A. T. Stewart & Co., about $400; claim of type founders in New York, about $200; claim of E. C. Estes, about $300; claim of J. T. McKinne, about $300; claim of C. F. Britton, administrator, about $120; claim of F. R. Pittman, administrator of B. B. Hathaway, $550; claim of F. R. Pittman as administrator of the said John T. Myrick, and as Clerk of the Circuit Court, about $600; and claim of James M. Sanderson as attorney for said estate, about $300; amounting to about $2,500; and whereas, the said Rebecca L. is willing to undertake the payment of said claims and demands and others against said estate, if the same shall appear to be just and proper, provided the said Frederick R. Pittman will turn over to her all of the assets in his hands as such administrator: Now if the said Rebecca L. Myrick shall pay the above claims as the same shall be just and proper, and hold the said Frederick R. Pittman harmless and forever discharged from said debts or demands, and all other debts or demands that may be brought against said estate, and against all claims and demands of whatever character that may be brought or presented against the said Frederick R. Pittman as administrator as aforesaid, then this obligation to be void. otherwise to remain in full force and virtue."

This suit is brought by the administrator of F. R. Pittman against the obligors in this bond. The complaint alleges that the bond was executed in pursuance of his desire that he might be "released from his responsibilities as said administrator so that he might be held harmless against the claims which had been presented, or might hereafter be presented,against said estate;" that in pursuance of the arrangement he turned over to her all the assets of the estate in his possession: that among the claims against the estate was a note executed by John T. Myrick, the intestate, dated April 30, 1861, whereby he promised to pay F. R. Pittman, exec-

utor of B. B. Hathaway, $332.83, with interest at eight per cent. per annum, payable one day after date, and that she refuses to pay said note.

An amendment to the declaration alleges that Mrs. Myrick was by said arrangement "to have the entire and sole control of all said assets, and to receive all the commissions, compensation and emoluments arising from the aministration of the estate;" that the note referred to was a just and proper claim against said estate, and she had in her hands ample assets of said estate to pay said note and all other claims against said estate that were just and proper.

The answer contains a recital that a demurrer to the complaint had been overruled, and that by leave of the court Mrs. Myrick filed her answer. No demurrer appears in the record. Russ, the co-obligor, made no answer, and it does not appear that he was served with summons. The cause came on for trial, and a verdict was rendered in favor of the plaintiff against the defendant, the damages being assessed at $760.89, upon which final judgment was rendered May 24, 1877.

Various exceptions were taken to the ruling of the court in the course of the trial, and to the charge of the court to the jury, which it is unnecessary to notice in view of the conclusions of the court.

In examining this record the first question that presents itself is, whether the complaint "states facts sufficient to constitute a cause of action." A defect in this particular is not waived by failing to demur. (Code, sec. 99.) A mere neglect to observe forms of pleading does not constitute such a defect as to make the complaint so insufficient, but if there be a total absence of the allegation, suggestion, or allusion to facts without which there can be no liability inferred, there is then a failure to state facts sufficient to constitute a cause of action.

An incurable defect is not waived by any pleading, but

may be taken advantage of whenever the parties are before the court. 8 Howard Pr. R., 159; 18 Barbour, 494; 37 N. Y., 640; 2 Bosworth, N. Y., 125.

But if the proofs disclose facts which, if pleaded, would give a right of action, the court may, when it would not substantially change the cause of action or defence, allow an amendment by conforming the pleading to the facts proved. Code, sec. 123.

This is not an "incurable defect." We will examine this case with reference to these rules, and if it appears that the plaintiff has stated and proved a case which demonstrates that he has no right of action, we cannot allow the judgment to stand, for it cannot be said that substantial justice is obtained by a judgment to which the plaintiff is clearly not entitled by his pleadings or proofs.

And the doctrine has been fully recognized by this court that an appellate court may look beyond the bill of exceptions and consider vital errors apparent on the face of the record, where such errors have not been waived by the pleadings. (Proctor vs. Hart, 5 Fla., 465; Crosby vs. Houston, 1 Texas, 203, 224.) And where the objection goes to the foundation of the action, and shows the entire absence of a right of action in the party on which to rest the judgment, it will not be deemed to have been waived by an omission specially to point it out in the assignment of errors. Wetmore vs. Woodhouse, 10 Tex., 33; Watts, *et al.*, vs. Waddle, 6 Peters, 402.

We have seen that where a complaint does not state facts sufficient to constitute a cause of action, the defect is not waived by a failure to take advantage of it by demurrer. (Code, sec. 99.) The liability of the defendant in the case at bar depends upon a breach of the condition of the bond mentioned in the complaint, and the question arises whether the plaintiff shows, either by the pleadings or proofs, that the defendant has been guilty of a breach.

The condition of the bond is that "the said Rebecca L. Myrick shall pay the above claims as the same shall be just and proper, and hold the said Frederick R. Pittman harmless and forever discharged from said debts or demands, and all other debts or demands that may be brought against said estate, and against all claims and demands of whatever character that may be brought or presented against the said Frederick R. Pittman as administrator as aforesaid." The complaint alleges that Mrs. Myrick has refused to pay the note of the intestate payable to the estate of Hathaway, of which Pittman was the administrator, and that this is a breach of the condition of the bond for which he may re-recover the amount due on that note.

Several claims are expressly named, and other possible claims are included in the condition, all of which she obligates herself to Pittman to pay, and save him harmless and discharged therefrom, and to protect him against personal liability as administrator of the estate of Myrick on account thereof. None of the claims mentioned are the personal demands of Pittman against Myrick or his estate, except a "claim of F. R. Pittman as administrator of the said John T. Myrick, and as Clerk of the Circuit Court, about six hundred dollars."

This personal claim is not demanded by the plaintiff in this suit, but he claims a judgment for the amount due from the estate of John T. Myrick to other parties, in which no personal interest is alleged or proved to be in himself. It is not alleged or proved that he has paid any of these claims, or that he has been sued, or judgment obtained against him as administrator or otherwise upon any of them, or that they are his property, or that the money is in any manner due to him individually. These claims, so far as they remain unsatisfied, are due to the parties enumerated or referred to, according to the plaintiff's complaint.

Suppose none of these claims against the Myrick estate

have been paid by Mrs. Myrick, and that she has refused expressly to pay them, has Pittman, under the conditions of this bond, a right to sue Mrs. Myrick and recover in his own name the amount due to A. T. Stewart & Co., and to the type founders, and to Estes, and McKinne, and Britton, and Sanderson, on the ground that she obligated herself to him to pay them and save him harmless; and suppose we were to hold that her failure to pay them was a breach of the conditions of her bond, and sustain a personal judgment against her in his favor for the amount of all these claims, and he collects the money by execution out of her property; what defence does this afford to her when she is sued as administratrix by Stewart and the others against these identical demands?

We cannot conceive that she could defend herself against such suits by pleading that she had paid them to her co-administrator, and thus it might appear that she would pay the identical claims twice, once to Pittman upon an irreversible personal judgment, and again as administratrix out of the assets of the estate of her husband.

Such a doctrine as is contended for to uphold this judgment cannot be sustained. The bond is clearly an obligation on her part to indemnify and save harmless F. R. Pittman on account of any liability growing out of his having been an administrator and his surrendering to her the assets of the estate for administration.

The consideration of the giving of the bond, as it recites, and as the complaint alleges, was that both parties were administering, that some debts were paid, and other debts were to be paid; that it was doubtful whether the estate would turn out to be solvent; that he wished to leave the State, and to transfer the burden of the administration to other hands; and that he should be protected in so doing from suffering any loss or damage growing out of his administration of the estate and transferring the assets to the adminis-

tratrix. Assuming the validity of the bond as between these parties, the expressed object was to assure himself that the administration would be properly conducted by her, and she would pay all such debts as the estate was liable to pay to such extent (the estate being solvent or insolvent) as both the administrator and administratrix would be liable to pay them out of the assets applicable to the debts.

This bond broken, gave to none of the creditors of the estate (other than Pittman personally) any right of action upon it to recover their claims, either to their full amount or *pro rata;* such creditors were neither parties nor privies to it, and no equitable rights vested in them are set up or pretended in this suit.

The declaration or complaint in this suit, indeed, sets out the purpose of the obligee, that he "informed the said Rebecca L. that he was about to remove to California, and desired to be released from his responsibilities as said administrator, so that he might be held harmless against the claims which had been presented, or might hereafter be presented, against said estate, and the said Rebecca L. Myrick being exceedingly anxious, as plaintiff believes, to get the entire control of the estate, and thinking thereby, as plaintiff believes, that she would be benefited by it," she and Russ executed the bond.

There is no doubt whatever that this recital in the complaint expresses precisely the intention of the parties, and we agree with the pleader that this is the effect of the bond. But it is insisted that because the plaintiff here was the administrator of the Hathaway estate, and the note in question was made payable to him as administrator of that estate, and because he as administrator of the Myrick estate had possessed and had surrendered to defendant as administratrix assets of this estate more than sufficient to pay the Hathaway claim, thereby he had made himself liable to the

Hathaway estate, and might be obliged to pay the amount thereof to the heirs of Hathaway, and therefore, in order that he might be saved harmless, he might recover the amount claimed by suit upon the bond. This position is not tenable. It is not alleged or proved that he has paid anything to the Hathaway estate or the heirs on account of this claim, or that he has been subjected to suit thereon which has fixed his liability to pay that estate or the distributees thereof, and until his legal liability to the Hathaway heirs or distributees, or to that estate, *growing out of his relations with the estate of Myrick*, shall have been established, there can be no recovery upon the bond in question, for until it be shown that he is damnified he cannot claim the indemnity.

The bond, by its condition, secures him against all debts and demands that shall be brought against the estate of Myrick, and against all claims and demands that may be brought or presented against the said Frederick R. Pittman as administrator of the estate of Myrick; and she binds herself that having the assets of that estate placed in her hands, she will administer and pay to the same extent that either or both would be held liable to the creditors of the estate to pay its debts.

Her liability to pay the debts of her intestate was not enhanced by the giving of the bond, either in her fiduciary capacity or personally, but the personal obligation extends by the bond to indemnifying him against any liability incurred by him as an administrator of the Myrick estate; a personal indemnity. Counsel for appellee cite several cases from the digests. That of Duvall vs. Snowden, (7 G. & J., Md.,) was the case of an action against an executor who had given bond to pay the debts, and was thus relieved of the necessity of returning an inventory under the statute, in which case he was by the statute made directly liable to creditors and legatees. In Carman vs. Noble, (9 Pa. St., 366,) it was held

that an agreement to indemnify a surety against debt or damage was broken by a recovery of judgment against the surety. In Bellune vs. Wallace, (2 Rich., S. C., 80,) and Leber vs. Kaffelt, (5 Watts & S., 40,) an ascertained liability to pay is a breach of a condition to indemnify and save harmless, and the party may sue before sustaining loss.

These cases do not touch the question. The appellee also cites St. Albans vs. Curtis, (1 D. Chipman, Vt., 164,) which he claims is directly in point: "Where the condition of a bond of indemnity is simply to save harmless from the payment of a debt, it is not broken until the obligee has been compelled to pay, or, having become liable, has paid or been put to expense. But if it be that the obligor shall pay the debt and discharge the obligee *therefrom,* and also save harmless, &c., upon the debt coming and no payment nor discharge, there is a breach." We have not access to the volume, but it is apparent that the obligee in that case was a debtor, principal or surety, and there was an ascertained or unquestioned liability to pay and a direct covenant to discharge from such liability. This is not such a case.

The case of Franks *et al.,* vs. Hamilton, (29 Geo., 139,) to which we are referred by appellant, was a suit upon a bond conditioned that "if the said W. L. Franks and C. J. Stevens shall pay or cause to be paid the aforesaid promissory note, (indorsed by Hamilton) so that, in no event, it shall be collected, or attempted to be collected, from the aforesaid Hamilton, endorser as aforesaid, then," &c. The court in its opinion say, "a collection of the note from Hamilton, or an attempt at its collection from him, was essential to a breach of the condition." This is a somewhat similar bond to the one before us, containing a condition to pay "so that," or to the end that Pittsman shall be saved harmless. But here we have the further condition that the amount of the indebtednees, *from which Pittman was to be protected,* is contingent, his liability is not ascertained, and therefore

there is no personal liability upon Mrs. Myrick which Pittman or his representatives in his individual right is entitled to recover. And there is the further direct statement of the bond in the case of Franks vs. Hamilton, that Hamilton is the endorser of the note, and the obligor is bound to pay it, "so that in no event it shall be collected, or attempted to be collected, from Hamilton." In the case at bar the complaint recites that Pittman "desired to be relieved from his responsibilities as said administrator so that he might be held harmless" against claims presented, or to be presented, against the estate of Myrick; and this is the effect of the condition of this bond, that Pittsman as administrator shall be saved harmless and discharged.

Because there is in the complaint no allegation, and in the record no proof, that Pittman has been made liable to pay, or that he has paid anything on account of any liability then or subsequently incurred by him as such administrator, we do not find that there has been any such breach of the condition as entitles him to maintain this action and recover from the obligor any money that is not due directly to himself.

The result is that this judgment must be reversed and set aside, both as to Mrs. Myrick and her surety, Russ, as there can be no judgment against Russ which does not bind Mrs. Myrick as principal to save him harmless.

This cause must be remanded, with directions to dismiss the suit, unless the plaintiff shall amend the complaint so as to show a right of action for the amount due on the note in question, according to terms and conditions of her bond.

THE STATE OF FLORIDA, ET AL., PLAINTIFFS AND RESPONDENTS, VS. THE FLORIDA CENTRAL R. R. COMPANY, DEFENDANT AND APPELLANT.

1. **Chancery practice forbids a direct taxation of costs as between solicitor and client against defendant; and the Code practice is not different in this respect.**

2. **Where the counsel has been employed to obtain or create a fund for the joint benefit of both parties, his fees, if he prevails, not if he loses, may be paid out of the funds; but where the interests of the parties are adverse, only the legal taxable costs can be allowed.**

3. **Notwithstanding an order directing a complaint to be dismissed, if the court has in its possession funds which have accrued from the management of the property, the subject-matter of the suit, it may direct payment of claims incurred for the protection and preservation of the property during the action.**

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

James M. Baker for Appellant.

Judge Maxwell of the First Circuit and Judge White of the Second Circuit, sat in place of the Cheif Justice and Mr. Justice Van Valkenburgh, who were disqualified.

JUDGE MAXWELL delivered the opinion of the court.

On the eighteenth of November, 1875, a judgment was rendered in the Circuit Court of Duval county in behalf of the State of Florida against appellant for $368,000, and appointing Joseph H. Durkee a master of the court to take charge of appellant's property and sell the same to pay said debt. An appeal was taken from this judgment, and at the June Term, 1876, of this court, the judgment was reversed, with costs against the State, and the bill ordered to be dismissed, with directions that the master restore the

property to appellant, and have reasonable time for the settlement of his accounts. Pending the appeal, H. Bisbee, Jr., presented his petition to the Circuit Court, setting forth his services in the case as solicitor for the State, and claiming that as the State was prosecuting the suit in the character of trustee for the benefit of other parties interested, and without direct pecuniary benefit to herself, and had no funds applicable to the payment of costs and expenses, and as by his services a final decree [judgment] was obtained to the effect above stated, by virtue of which Durkee, the master, was put in possession of the property, he was entitled to reasonable counsel fees, to be charged upon the defendant or upon the property, "as in other cases of trust," and praying an order to the master to pay his fees from money arising from the income and tolls of appellant's property, his fees being $6,000, as fixed between him and the State. The petition was *ex parte,* bearing date July 24, 1876. So far as appears there was no notice to appellant. The Circuit Court on the 27th of July, by endorsement on the petition, made an order directing payment as prayed for, and the paper was filed August 4.

Another order of October 3, 1876, directs the master to pay Paul B. Canova $274. This is based upon account for cross-ties furnished, as appears by endorsement thereon, in April, 1874, at which time the property was in the hands of a receiver, who had been appointed in this case.

An account of Frank R. Pond of 1874 for $276.07, was by another order of October 31, 1876, directed to be paid by the master. This was for materials also furnished while the property was in the hands of the court's receiver in this case. There was still another order directing payment of a claim of Charles B. Fenwick.

This appeal is from these several orders, the granting of which is assigned for errors. As to Fenwick he has had no

notice of appeal, and without such notice no judgment affecting his rights can be entered by this court.

The question presented by the order in favor of respondent Bisbee is, whether the case was one in which counsel fees of the complainant should have been allowed against the defendant. Under the practice in chancery, a direct taxation of costs as between solicitor and client against defendant cannot be made, the defendant not being liable for costs, except such as are fixed between party and party. 2 Dan. Ch. Pl., 3d Ed., 1509-11-82 and 1496.

But Bisbee claimed that his counsel fees should be allowed on the ground that the complainant was proceeding as trustee to get from defendant's property a fund for the benefit of others.

In chancery, "as between party and party, the counsel for the complainant has in no case a right to be paid extra counsel fees out of a fund belonging to the defendant, except where the counsel has been employed to obtain, or create such fund for the *joint benefit of both parties*. Where the interests of the parties are adverse, nothing beyond the legal taxable costs can be allowed by one party as against the other." Ryckman vs. Parkins, 5 Paige, 545.

In some cases, where the trustee has charge or control of the fund, he will be allowed his counsel fees out of these, even when he is the failing party, but such cases are exceptional; and we know of none where such allowance will be made to a trustee, failing in his suit, where the property belongs to and is in possession of the defendant.

We do not see that the code authorizes a different practice, its provision in section 254, for allowance "in difficult and extraordinary cases," evidently referring to cases in which the *prevailing* party seeks indemnity for his expenses. This class of cases is defined in Hart vs. Bostwick and wife, 14 Fla. R., 162, in which it is announced that the question of such allowance "is not a matter of discretion but of ju-

dicial judgment." Of course such judgments can only be arrived at by judicial investigation, both parties concerned having a right to be heard.

In the case of Bisbee there was no party heard before the court but himself. By his own account for fees the appellant could have shown that of the amount claimed $4,000 was for arguments in two appeals in the case before this court, one of which, as appears by the records here, had been decided adversely to complainant at the January Term, 1875, and before the final judgment against appellant directing a seizure of the property, which was November 18, 1875. And to that much Bisbee's client was the losing party.

In regard to the second appeal, in which he charges for argument in this court, it was here and argued at the June Term, 1876, the appeal leaving it undertermined who would be the prevailing party, notwithstanding which the order of July 27, 1876, was made for payment of his fees out of appellant's property. But that appeal also was at that term decided adversely to his client and with costs, in favor of appellant. After such a result, even if the order was not improper in itself, it would now be the duty of this court to set it aside. It would be manfully unjust to allow counsel fees against the prevailing party, where the whole history of the case shows that the suit was founded upon a mistaken claim against that party.

As to the orders directing payment of the accounts of Canova and Pond, appellant does nothing more than assign the granting of these as error, giving no suggestions as to the specific grounds upon which it is claimed there is error. The account of Canova is for one thousand and ninety-six cross-ties, furnished one of the receivers appointed by the court in this case, to be used in the maintenance of the road, and is approved by that receiver. The account of Pond is for materials furnished a prior receiver for keeping in repair the rolling stock of the road. In regard to these we think

it was within the power of the party in possession, as the officer of the court in this cause, to make accounts of this character. (1 Wood's R., 331.) The order appointing them gave authority to operate the road, and the articles furnished were necessary to the preservation of the property in their possession.

The expense incurred in procuring them was for the benefit of all the parties to this suit, and it was proper for the court to direct payment for whatever went to the benefit of property in its possession and control. With funds in the hands of the officer of the court, it is not an improper practice that a party having such claim should obtain an order to the receiver for its payment. In this case no question arises as to priority of claim upon the funds, as the order is to pay from funds not necessary for the operation of the road. There is no rule requiring a receiver to give notice to the parties of any payments he may make within the scope of his authority. He may pay, and upon the final passing of his accounts, the parties may object as in other cases. We think the special orders directing the payment of these accounts were correct, and the fact that they were made after the bill was directed to be dismissed, does not affect their legality.

The rule upon this subject is that the discontinuance of a suit does not discharge a receiver appointed therein. 1 Barb. Ch., 246; 2 do., 471; 1 Hogan, 174.

The funds being in possession of the court, it necessarily has jurisdiction to make an order for their distribution.

Upon the views herein expressed our judgment is that the order in favor of H. Bisbee, Jr., be reversed and set aside with costs against him, and that the orders in favor of Paul B. Canova and Frank R. Pond be affirmed with costs against appellant.

THE STATE OF FLORIDA AND THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, PLAINTIFFS AND RESPONDENTS, VS. THE JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY AND MILTON S. LITTLEFIELD, DEFENDANTS AND APPELLANTS.

1. Under the provisions of the statutes regulating the exchange of State bonds with the Jacksonville, Pensacola and Mobile Railroad Company for its bonds, the State was to occupy two relations to the purchasers of the bonds of the State. The first was that of primary debtor to the holder, and the second was that of trustee holding the bond of the company and the lien created by the act to secure payment to the party who advanced money to the company. The Legislature had no authority to create the first relation. It did have power to create the second, and a decree based upon the relation of primary debtor as fixed by the statute is erroneous. The case of Holland vs. The State of Florida, 15 Fla., 456, and the case of The State of Florida, et al. vs. The Florida Central Railroad Company, et al., 15 Fla., 724, commented upon the following, so far as applicable to this case.

2. Bonds issued by the railroad companies under the provisions of the act of the Legislature of January 10, 1855, were, under the statute, a first lien or mortgage on the roads, the equipments and franchises of the companies issuing them. A sale by the Trustees named in the act having been had and a balance of purchase money being due, an equitable lien for such balance resulted primarily to the Trustees as the vendors in the sale. A balance of purchase money being due upon the sale of each road, the right of the vendors is to a sale of each road separately. A sale of both estates for the payment of the aggregate amount of the liens cannot be had. The lien of the Trustees for balance of purchase money due upon the sale of the Pensacola and Georgia and the Tallahassee Railroads, and the lien of the State as trustee upon the Jacksonville, Pensacola and Mobile Railroad, examined and defined with reference to the parties to this suit. In this case the State admits the existence and priority of the lien of the Trustees. The case of The State of Florida vs. Anderson, et al., 91 U. S., 669, commented upon and followed, so far as applicable to the pleadings and proofs in this case.

3. The Circuit Courts under the Constitution of this State have no power to have a sale by their own officers by virtue of their decree of property in another circuit. Their authority in such cases does not ex-

tend beyond establishing the rights and defining the liens of the several parties before them.

4. A case should not be remanded with directions to modify a judgment therein made unless the proofs in the record authorize such modification. The existence of *bona fide* purchases of State bonds is not established by the proofs in this case so as to authorize a final judgment, and this court should not direct any action to be had based upon the existence of such fact. This court is controlled by the record.

5. Where the evidence of a debt alleged to exist is a note, bond or mortgage, the party seeking a final decree based thereon should produce such note, bond or mortgage.

6. There cannot be in the same case two inconsistent final judgments covering the same subject-matter against the same defendant, based upon the same pleadings by the same plaintiff. The first judgment covering the subject must stand until it is reversed or opened and vacated.

7. Under the statute of this State and the code practiced as modified, an appeal lies from a final judgment by default, which is similar in its character to a decree *pro confesso* under the practice anterior to the code. Such judgment must conform to the matter of the pleadings of which defendant has notice, the plaintiff not being allowed to take such decree as he can abide by. A judgment by default, inconsistent with the case made in the original complaint and conforming to a new case made by an amended and supplemented complaint, filed three months after service of summons upon the defendant, without notice to him, is not authorized by the code practice as modified by statute in this State.

Appeal from the Circuit Court for Duval county.

This is an action under the Code.

Duval county, in which this cause was brought in the Circuit Court, is in the Fourth Judicial Circuit. The judgment of April 2, 1874, for $661,845.55, mentioned in the opinion, is in favor of the Trustees of the Internal Improvement Fund of Florida for the balance of purchase money of what were March 20, 1869, the Pensacola and Georgia Railroad and Tallahassee Railroad. These roads were sold by the Trustees of the Internal Improvement Fund March 20, 1869, under the provisions of the internal improvement law of Florida. (Chapter 610.) These roads were knocked off

to F. Dibble and associates, who never paid the $572,000 of the purchase money. The State bonds mentioned in the opinion are those issued to the J., P. & M. R. R. Company under the acts of the Legislature of Florida providing for "Perfecting the Public Works of the State," being Chapters 1716 and 1731, Laws of Florida.

For a proper appreciation of the opinion of the court in this case, it is necessary to read the cases of Holland vs. The State of Florida, et al., and The State of Florida, et al. vs. The Florida Central R. R. Company, et als., in 15 Fla., commencing respectively on pages 455 and 690.

The other facts are stated in the opinion of the court.

James M. Baker for Appellants.

The bill in this case was filed for the purpose of enforcing a claim of the Trustees against the said defendant company due on purchase of road.

The Central Railroad Company was made defendant, though not responsible for the claim. The State was made a party complainant, but without having any legal or equitable right of action.

The first decree was entered against the J., P. & M. R. R. Co. for the said purchase money. A second decree was rendered in same suit against the J., P. & M. Railroad Company for interest claimed to be due on mortgage bonds held by the State in which the Trustees had no interest.

In the same decree bonds of the Pensacola and Georgia R. R. Co. are decreed to be the property of the Trustees and are ordered to be cancelled. In the same suit or action a decree was also rendered against the Florida Central Railroad Company for alleged interest due the State on certain other mortgage bonds—a decree in which the said Trustees had no interest.

Where the plaintiffs have no common interest but assert

distinct and several claims against the same defendant, the bill is multifarious. Story Pl., §279 and notes.

The complainant in this bill seeks relief in respect to matters which are, in their nature, separate and distinct and is multifarious, and should be dismissed even without objection from defendant. Story Pl., §271 and notes.

It is multifarious to mix up different proceedings requiring different decrees. Alger vs. Scoville, 6 How., N. Y., 131; 9 How., N. Y., 113; 8 How., N. Y., 73; Mattair, et al. vs. Payne, et al., 15 Fla., 682.

When a joint claim against two or more of the defendants is joined with a separate claim against one of the defendants, the bill is multifarious and cannot be amended. 6 Paige, 18; 5 Paige, 65.

The code authorizes several causes of action to be united when they arise out of the same transaction, or transactions connected with the same subject. Code, 39.

The Circuit Court of Duval county had no jurisdiction over the 103 bonds of the Pen. & Ga. R. R. Co. and Tallahassee Railroad Company, adjudged in said decree of 1875 to be the property of the Trustees of the Internal Improvement Fund.

Said bonds appear from the testimony in the case to have been at date of said decree in the possession of Doggett, Master in Chancery in the case of Vose vs. The Trustees, in the U. S. Circuit Court. Said bonds were filed in said court by T. Mayhew Cunningham, who was in possession and could not be divested of his right of possession by a decree of a State court, in a suit in which he was not even a party.

The said bonds were not in the hands of Papy when enjoined, and it does not appear that they were ever within the control or jurisdiction of said Circuit Court of Duval county.

It does not appear that the said bonds were ever deliv-

ered to either M. S. Littlefield or to the J., P. & M. R. R. Co., or that they were ever in the possession or control of either of them. That if any agreement existed between them as alleged, it was not carried out, and it never was in their power to do so. So that the Trustees acquired no right to the possession or control of said bonds under said agreement.

The supplemental bill was filed in this case on the 24th day of March, 1874, after the defendant's answer was stricken out, which contains the only prayer for judgment against the defendant for interest on bonds. In resistance of such judgment the defendant had a right to answer or demur.

When the amended bill was filed, only $120,000 of the copuons of the company was claimed to be due. The record shows that more than that amount thus claimed had been paid by the taking up and paying the coupons by the State bonds. At the commencement of this suit there was no default in payment of interests and none claimed. No demand can, therefore, be allowed for a claim arising against defendant after the commencement of the suit.

The bonds issued by the State were null and void and constituted no consideration for the Company's bonds, and the *State* held no valid claim against the company arising therefrom.

The complainant does not demand any specific amount of damages, but simply alleges a default in payment of interest for more than twelve months, and prays a seizure and sale of defendant's road under provisions of the act of Oct. 28, 1870.

That the judgment is inconsistent with the allegations and prayers of the complainant, both as to the interest on bonds and the one hundred and three thousand bonds. That the final judgment of April 2, 1874, exhausted all claims for further relief under the pleadings. All relief not therein

granted was denied, and became and was *res adjudicata* as to the complainants.

If the judgment rendered August 20, 1875, was regular and valid, then under the pleadings in the case the complainants are entitled to proceed and take two other judgments against the same parties, one for sinking fund claimed to be due, and another for the over issue of bonds alleged.

W. G. M. Davis for Appellees.

The appellant seeks to reverse so much of the judgment of the court below as adjudged the one hundred and three bonds in the pleadings mentioned to be delivered to the trustees (appellees) to be cancelled, and further ordered and decreed the defendant company (the appellant) to pay to the State the interest then due on the bonds held by the State of Florida, issued by the defendant company, (the appellant) and that the State held a statutory lien for the payment of such money on the railroad franchise and property of said company.

The trustees, defendants, insist that the judgment in their favor is correct, for the following reasons:

1st. It appears from the testimony that Geo. W. Swepson was appointed the agent of the trustees to purchase for them the Pensacola & Georgia and Tallahassee railroad bonds, of which the one hundred and three bonds were part; that he failed to make such purchase himself, but made a contract with Littlefield by which he sold to him a large amount of stock in the J., P. & M. and Florida Central Railroad Companies, in consideration of which Littlefield, among other things, agreed to perform the contract of Swepson before stated. In pursuance of such agreement, or in fulfillment thereof, Littlefield purchased from Edward Houstoun the one hundred and three bonds. It is material to note, in this connection, that it appears from the agreement made

between Littlefield and Houstoun, which provided for the payment by Littlefield to Houstoun for these bonds and certain stocks, that Littlefield gave a draft signed by himself as President of the J., P. & M. Company on S. W. Hopkins & Co., who were the agents of the company for the sale of four million bonds, and that Hopkins paid the draft out of the money for which the bonds were sold by them.

The answer of M. D. Papy, and the testimony of Littlefield, show that the statement above made as to the contract of Swepson for the purchase of the bonds by Littlefield and the mode of payment is correct. The evidence of Littlefield sustains the statement.

2d. So far as Swepson's obligation given to the trustees is concerned, it matters not whether he received the sum of money mentioned in this receipt or not—he was estopped to deny the receipt of the money. The trustees accepted his obligation, he recognized it as binding when he made the sale of the stock to Littlefield, and bound Littlefield to perform the obligation, and to purchase the bonds and deliver them to the trustees for cancellation.

Littlefield must be treated, when making the purchase, as acting in performance of his contract, and the trustees must be held as entitled to the benefit of the purchase. The court below rightly treated the purchase in this light. So far as Littlefield was concerned, he became a trustee of the bonds, and was bound to deliver them to the trustees, the appellees. He was estopped to deny such application of the bonds as the court decreed.

Littlefield, in his testimony, professed to be unable to decide whether the bonds belonged to him or to the J., P. & M. Company. The company did not, in the course of the proceedings, set up any title to the bonds. It is true that the purchase-money was paid by Littlefield out of money that stood to the company's credit in the hands of Hopkins & Co.; but as the company was bound by its contract, un-

der its charter and by its written obligation, to remove all encumbrances, if any there was, upon the property which it pledged for the payment of the four million bonds, it was estopped from purchasing the bonds with the view to hold and assert them as a superior or prior obligation to that which it entered into when it received the State bonds so-called.

A court of equity would not allow the company to buy up and keep on foot obligations, with the intent to use them to the prejudice of those in whose favor the statutory lien on the company's property was created by its act.

The fact that the one hundred and three bonds were paid for with the money derived from the sale of the State bonds so-called, would compel any court of equity to decree what the court below did decree.

If the views thus presented are well founded in law and sustained by the evidence, the decision in the court below must be affirmed; or, if not formally correct, in the judgment of this court, a judgment must be pronounced here adjudging the one hundred and three bonds not to be the property of Milton S. Littlefield, nor of the J., P. & M. Company, and not a charge on any fund in the hand of the trustees. As the bonds were not in the actual custody of the Duval Circuit Court at the time when its judgment was rendered, nor in the possession of Littlefield, nor of the J., P. & M. Company, as no decree could be rendered directing their delivery to the trustees, by said defendants, a decree settling rights of the trustees and of Littlefield and the company, in respect of the bonds, was proper to be made by the court.

M. D. Papy, in whose custody the bonds were at the commencement of the suit, was made a party, and enjoined from parting from the possession of the property. He answered and disclaimed title in himself, and set up an agreement which is found in the pleadings. He was bound by the de-

cree. It is important to the estate of Papy, as well as to the trustees, that the judgment should be affirmed in order that the trustees may be able to take proceedings in the courts of Georgia and the Circuit Court of the United States to obtain the possession of the bonds. An affirmance of the judgment settles the title to the bonds in favor of the trustees as against Littlefield, who bought them, and the J., P. & M. Company, which paid the purchase-money. The claims of all persons who set up title under Littlefield, such as Bayne, Rogers and Clingman, can easily be disposed of, because of their knowledge that the bonds were paid for, not with Littlefield's money, but in the manner stated.

The appeal in respect to that part of the judgment of the court below which decreed interest against the J., P. & M. Company, and that it was due to the State, and which declared its property to be subject to a lien for its payment, was clearly correct as the law and the facts stood at the time of the rendition of the judgment.

1st. The answer of the company which was declared frivolous was clearly so. It admitted that the contract stated in the complaint existed, admitted the right of the State to recover on the contract; but set up payment in part of portions of the interest, (which credit, so claimed, is allowed in the decree.)

It was apparent, from the answer, that the company had not complied strictly with the forms of its contract. It had never made any payment to the State directly. The judgment allowed a credit of coupons of the State bonds, which the company paid by diverting a portion of the money for which said bonds were sold, instead of applying such bonds to the repair of the railroad. The court saw in the answer the intent to raise a frivolous question as to the griht of the State to claim interest of the company before payment of interest on the State bonds. Seeing this, the court correctly adjudged the answer frivolous,and decreed a performance of

the contract. It is apparent that the form of the decree needs to be modified, in view of the decision made by this court in the case of Holland vs. the State, so that the judgment may operate in favor of those who are, by that decision, declared to be the beneficiaries of the trust created by the act incorporating the J., P. & M. Company, the issuance to, and the sale by, it of the State bonds so-called. Whether it will be proper for this court to direct such modification of the judgment, or to make any other alteration to make it conform to the decision before mentioned, as well as to provide for further proceedings in the court below to enable it to give full relief to the holders of the State bonds so-called, this court will determine. It appears to counsel for appellees that there should be an entry in the cause in the court below, setting forth that the holders of the coupons on the State bonds so-called are entitled to the benefit of the decree for the payment of interest due on ———— day of ———— for which the judgment was rendered, and that the holders of similar coupons, which have become due since that time, as well as such as may hereafter become due, shall have the right to come in under the judgment, prove their claims, and have execution, so that, when the property of the company is sold under such judgment, the money arising from such sale shall be properly apportioned among those entitled to share therein.

Inasmuch as the judgment was rendered under the Code, as the property of the company is bound by the judgment, but is not within the Fifth Judicial Circuit, it may be proper that this court should, to avoid litigation, and to simplify the proceedings under the judgment, give directions as to the mode of execution. It is in the power of the court upon the appeal to make such provisions in respect to the matters last mentioned as to it may seem fit, and make a decree therefor. It may be proper to say, in case any question shall be raised as to the jurisdiction of the

court below over the subject-matter upon which it gave judgment, that the J., P. & M. Company and M. S. Littlefield appeared in the cause—therefore, both Littlefield and the corporation are bound by the judgment. There is no such assumption of jurisdiction over property not within the Circuit as occurred when Greeley was appointed receiver in the cause. The judgment is against the person; it is not *in rem,* and cannot be executed upon the property of the company, being outside of the Fifth Judicial Circuit, unless it is done by some proceeding in the court of another Circuit, or unless this court shall direct that the judgment may be executed in any Circuit by a referee appointed by the Duval Circuit Court. It is respectfully submitted to the court that some direction as to the practice to be pursued in this and other cases of like character should be established by the court, there being no statute which prescribes any rule on the subject. The power exists, and should be exercised, to make perfect the remedy—else the judgment will be a nullity, although the court had the power to render it.

Judge Maxwell, of the First Circuit, and Judge White, of the Second Circuit, sat in the places of the Chief-Justice and Mr. Justice Van Valkenburgh, who were disqualified.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a case under the late Code.

Appeals from the judgment rendered herein are prosecuted by the Jacksonville, Pensacola and Mobile Railroad Company, and by Milton S. Littlefield.

The appeal of the Jacksonville, Pensacola and Mobile Railroad Company is from the judgment rendered against it in behalf of the State, as well as that rendered against it in behalf of the Trustees of the Internal Improvement

Fund. The appeal of Milton S. Littlefield is from the judgment rendered against him in behalf of the trustees.

We make no statement of the case in detail. Our views of the facts and of the case will appear as we treat and dispose of each appeal.

The decree in behalf of the State in this record is not by virtue of its relation of trustee for *bona fide* purchasers and holders of the bonds of the State of Florida exchanged with this company for its bonds and sold, but it is based upon the fact that the State of Florida has in possession the bonds of the Jacksonville, Pensacola and Mobile Railroad Company, upon which that company has failed to pay inrerest. The right of the State as trustee can exist only upon clear proof of the existence of *bona fide* purchasers of the State bonds. The State as the simple holder of the company bond is entitled to no judgment against the company. The fact which makes any equity operative in her behalf must exist in connection with the fact that the State holds the company bond. This court considered the general nature of the bonds which are the foundation of the State's claim here in the cases of Holland vs. The State of Florida, 15 Florida, 534, and the case of the State of Florida against The Florida Central Railroad Company, 15 Fla., 691.

In the case of Holland vs. The State of Florida we said, "A careful and strict examination of this statute will show that the State of Florida was to occupy two distinct and different relations to the holders of the State bonds and to the company. The first relation was that of primary debtor to the holder of the State bond under and by virtue of the obligation of this bond, and also of mortgage creditor of the company, under and by virtue of the bond of the company. The right of the State, viewed in this light, was to be simply that of a mortgage creditor of the road, and its liability to the holder of the State bond was that of a simple bond debtor. In this relation the holder of the State

bond was to have no security for his protection and payment, except the liability of the State in its own right, and its good faith and capacity; the State, at the same time, as the result of this relation, being given for its own protection against this bond debt the right to become the purchaser at the sale of the road, and to pay for it in the bonds of the company. The other relation which it was to occupy was, in the language of the act, a trustee for the holders of the State bonds. In this relation the lien created by the statute was for the benefit of the holder of the State bonds. The lien of the statute and the company bond, viewed in this light, was for his benefit, and the property and franchises of the company were to be his security for payment; and as the company received his money and the State received nothing, the company was to be held to the obligation of common honesty in the matter of payment and satisfaction." This court in that case remarked further, "That the Legislature could not, under the Constitution, create the first relation of primary debtor, and that it would seem to be a consequence that such part of the statute authorizing the bond as provided for the State's protection against such liability as the Legislature presumed the State incurred, would fail and cease to be operative." This, we think, was correct. The clear result of the views expressed in that case prohibits the State from occupying the relation of a simple mortgagee entitled to a decree in its favor in that relation. We re-affirm what was there said.

The State of Florida in this case, in addition to its relation as trustee for the *bona fide* purchasers and holders of its bonds, has also a residuary interest in the Internal Improvement Fund, as well as an interest in its management and disposition through her agents, the Trustees.

The subject-matter of this action, so far as it is common to the Trustees of the Internal Improvement Fund and the State of Florida, is a line of railway extending from Quincy

to Lake City, with a branch to Monticello, and the line of railroad extending from Tallahassee to St. Marks. The Trustees claim a lien for balance of purchase money due upon a sale of the road from Quincy to Lake City and branch to Monticello, under a statutory mortgage bond of the Pensacola and Georgia Railroad Company. They also claim a lien upon the road from Tallahassee to St. Marks for the balance of purchase money due upon a sale of that road, under a statutory mortgage bond of the Tallahassee Railroad Company. The State as trustee claims in this suit only a subordinate lien upon these two lines of railroad, and, in addition thereto, the State claims a primary and first lien upon the railroad from Quincy to Chattahoochee as a part of the Jacksonville, Pensacola and Mobile Railroad. The question as to the character and extent of the right of the Trustees of the Internal Improvement Fund, the right of the State as having a residuary interest in such fund, and the rights and remedies of holders of bonds issued under the internal improvement act of 1855, were considered by the Supreme Court of the United States in the case of The State of Florida vs. Anderson, et al., 91 U. S., 667. The views there expressed are entirely applicable to the pleadings and proceedings in this action. We will not here repeat them at length, but will state simply our entire acquiescence in the views there expressed. Under this decision the right of the Trustees of the Internal Improvement Fund, as vendors, is to a sale of the road from Quincy to Lake City, to satisfy the balance of the purchase money due them upon the sale of that property, and as to the balance due on the sale of the road from Tallahassee to St. Marks, they have a right of the same character against that road. The State's right as trustee, in the event of proof of *bona fide* purchasers and holders of State bonds, is to what remains after satisfaction of these several liens upon these several pieces of property, if that sum is necessary to the payment

of what is found to be due the State as trustee after due process of judicial examination.

The *rem* here in question, the property of the J., P. & M. Co., is not claimed by the plaintiff to embrace the line of road extending from Jacksonville to Lake City. This being so, no part of the property is in the territorial jurisdiction of the Circuit Court of the Fourth Judicial Circuit. That court, under the Constitution of the State, has no power to decree a sale by its officers of property not within its territorial jurisdiction. (15 Fla., 285.) The power of the Circuit Court, therefore, in this case did not extend beyond a decree establishing the rights and defining the liens of the State and of the Trustees, as we have stated them. That court should have adjudged two liens existing in behalf of the Trustees. One as to the road from Tallahassee to St. Marks for the balance of the purchase money due thereon, the other as to the road from Quincy to Lake City for balance of the purchase money due thereon. In such a case the right of the vendor is to a sale of each road separately, on non-payment of what is due on it. He cannot sell both estates on non-payment of the aggregate amount of the liens, and any decree establishing the lien of the State should conform to the law upon this subject. 8 Eng. L. & Eq., 46; 10 Met., 172.

As against the J., P. & M. Co., the State had a further lien of the character given by the statute as to the road from Quincy to Chattahoochee.

In the case of the State, if the relation of primary debtor had been constitutional, to conform to the statute the court would simply have passed a decree establishing the amount of principal and interest due on the company bonds; the default of twelve months in the payment of interest; the amount of the State bonds outstanding, and would have made such decree as to sale as was authorized by the statute. When, however, the only right of the State is as trus-

tee, the court should conform to the right of the State in that relation as defined and fixed by the statute. This is a right to sale of the entire property, limited by the right of the Trustees as vendors as before stated, and an establishment by decree of the debt for the payment of which it was to be sold. Under the terms of the statute, upon a sale the proceeds were to be applied promptly and exclusively to the payment and satisfaction of the bonds issued by the State of Florida under the act. The bonds were not valid as a primary obligation against the State, but they were effective when held by *bona fide* purchasers, as showing who were the *cestuis que trust* under the statute.

The decree now before us establishes the debt of the company to the State, and a default of twelve months in payment of the interest due thereon, and passes what is a judgment *quod recuperet* for the interest. For these reasons this judgment in behalf the State must be reversed.

It only remains to consider what is the proper disposition to be made of the case of the State in view of the pleadings and proofs herein. Should the order be to dismiss absolutely or without prejudice to the right of the State as trustee, or should it be, as suggested by counsel for the State, to remand, with direction to modify, the decree, and for further proceedings in the court below to enable it to give full relief to the holders of the State bonds? We cannot direct a modification of the decree, among other reasons, because that can be proper only in the event that the proof justifies such order, and there is no such satisfactory proof here as should be required. The only proof in this record that there is a *bona fide* purchaser of a State bond in existence is this sentence in the testimony of Milton S. Littlefield: "I sold and delivered to S. W. Hopkins & Co. three thousand bonds of the State of Florida of $1,000 each, which were received in exchange for the railroad company's bonds, numbering from No. 7 to No. 3,000 inclusive." Under the

circumstances of this case the least that should be required is the production of these bonds and full proof of *bona fide* purchase and ownership. The better practice, where a debt is evidenced by a note, bond or mortgage, is to produce such note, bond or mortgage, and while in some cases such strictness may not be required and a smaller degree of proof may suffice to make a *prima facie* case, yet here, where the State is a simple trustee with a power of sale seeking a final decree, and where, if the bonds are in the hands of the J., P. & M. Co., never having been *bona fide* sold, they constitute no lien, (15 Fla., 725,) we cannot accept as proof upon which to base a decree the naked statement of the president of that company that he sold those bonds to a party who, this record discloses, was the agent of that company. There are also other suspicious circumstances which it is unnecessary to mention.

As to the suggestion in reference to calling in the holders of the State bonds. We have no satisfactory proof that there are such. We cannot, looking to this record, say that such is their wish, or a probability that such will be their act. These parties may claim that they have the right to disavow the act of the State in this proceeding; that they are not bound thereby, and will seek their remedies, and assert their own rights as they view them, elsewhere. Again, this action has been pending for over six years, and this record discloses no attempt of such persons, if any such there be, to come into this suit. While all this is true, and the strict rule of practice would justify an order of dismissal absolute, still we think we are justified in doing no more than directing the bill on the part of the State as against the J., P. & M. Co., so far as it claims a lien against said road, to be dismissed without prejudice to the right of the State as trustee to assert in a new suit a lien subordinate to the lien of the Trustees of the Internal Improvement Fund as to the several roads extending from Quincy to Lake

City with branch to Monticello, and from Tallahassee to St. Marks, and without prejudice to the right to assert in a new suit a general lien as trustee upon the other property of said company.

The State having joined as co-plaintiff with the Trustees in this suit, and having admitted their prior lien as to the road from Tallahassee to St. Marks and from Quincy to Lake City and branch to Monticello, and such lien having been established by the judgment of the Circuit Court with its consent, the order dismissing the bill should not leave that an open question.

The J., P. & M. R. R. Co. appeals also from that portion of the decree of August 20, 1875, wherein it is adjudged by the court that one hundred and three bonds, some of the Pensacola and Georgia Railroad Company and some of the Tallahassee Railroad Company, were the property of the Trustees of the Internal Improvement Fund as against said company, and that when recovered these bonds should be cancelled. This record discloses that on the second day of April, A. D. 1874, there was a final judgment rendered against this company for $661,845.55-100.* This judgment was based upon the case made by plaintiff in the complaint and amended complaint in this action. For this sum this final judgment declares that the Trustees have a lien on all the property of the company owned by it at the commencement of the suit, as well as a lien upon all the railroad "situate between Lake City, Columbia county, Florida, and Quincy, in Gadsden county, and upon the branches thereof from Tallahassee, Leon county, to St. Marks, Florida, and to Monticello, in Jefferson county, and upon the iron, road-bed and depots thereon or connected therewith, from the 20th day of March, A. D. 1869." This decree was final. It ad-

*The J., P. & M. Company appealed in this case from this judgment, and the appeal was dismissed by the Supreme Court on motion of the Trustees of the Internal Improvement Fund, at January Term, A. D. 1878. —Reporter.

judicated the rights of the parties; it embraced the one hundred and three bonds; it provided that the defendant company should have the right to credits upon the decree, and the Trustees should make credits to the amount of the principal of any of the bonds of the late Pensacola and Georgia Railroad Company and of the late Tallahassee Railroad Company which the said defendant company may tender for cancellation, the acceptance and cancellation being made discretionary with the Trustees. Without opening this judgment and without any additional pleadings by the Trustees in reference to the one hundred and three bonds, we find this decree of August, 1875, establishing the title of the Trustees to the one hundred and three bonds as against this company. This decree, as it recites, is based upon an agreement by the company to purchase and deliver the bonds for cancellation. The prior final decree adjudged that the Trustees had a lien on all the property of the company for this sum. The question, therefore, is whether this subsequent judgment of the court, inconsistent with a final judgment before made based upon no new pleadings, is not erroneous, the prior final judgment not having been opened or in any manner set aside. Under these circumstances this last judgment must be reversed. The two cannot stand together. A judgment that the one hundred and three bonds constitute, in the hand of the defendant company, no claim against the fund, is inconsistent with the judgment establishing a lien in favor of the Trustees for that sum, and from that judgment there is no appeal here. As to the matter in controversy, the judgment of April 2, 1874, was *res adjudicata*, until reversed or vacated. (35 Barb., 214.) There cannot be in the same proceedings two inconsistent final judgments against the same defendant, based upon the same pleadings by the same plaintiff. If, without opening or setting aside the first final judgment, a second inconsistent one can be entered, why cannot a third and fourth inconsis-

tent final judgment be entered? With such a rule there would never be an end to litigation.

This judgment of August 20, 1875, must be reversed as to the J., P. & M. Co., in so far as it adjudges the one hundred and three bonds to be the property of the Trustees of the Internal Improvement Fund, subject to be cancelled. This, however, to be without prejudice to any right which said Trustees may have, or to any application they may make to reform or change, upon proper proceedings, the judgment of April 2, 1874.

We next examine the appeal of Milton S. Littlefield. Plaintiffs allege in their original complaint that "they have been informed and believe that Milton S. Littlefield has in his possession and control a large number of the first mortgage bonds of the said Pensacola and Georgia Railroad Company, for the payment of which the balance of said purchase money is, when collected, made applicable by law, and that the defendant, M. D. Papy, holds another large number of the last aforesaid bonds as the agent of the said Railroad Company, or of the said defendant, George W. Swepson, all of which said last mentioned bonds equitably belong to the Trustees of the Internal Improvement Fund."

The prayer of the original complaint was for judgment against the J., P. & M. R. R. Co. for the sum of $572,000 and costs, and for an injunction restraining M. D. Papy and Milton S. Littlefield from parting with the possession and from disposing of, or in any manner incumbering the bonds "now in their possession, custody and control, either as trustees or otherwise," until the further order of the court. There was an injunction awarded against Papy and Littlefield in accordance with the prayer of the bill, as to any of the "bonds of the Pensacola and Georgia Railroad Company."

The summons issued upon the filing of this complaint was served upon Milton S. Littlefield on the 20th of March, 1872.

judicated the rights of the parties; it embraced the hundred and three bonds; it provided that the defenc company should have the right to credits upon the dec and the Trustees should make credits to the amount of principal of any of the bonds of the late Pensacola Georgia Railroad Company and of the late Tallaha Railroad Company which the said defendant company tender for cancellation, the acceptance and cancellation ing made discretionary with the Trustees. Without o ing this judgment and without any additional pleading the Trustees in reference to the one hundred and three bo we find this decree of August, 1875, establishing the of the Trustees to the one hundred and three bond against this company. This decree, as it recites, is b upon an agreement by the company to purchase and de the bonds for cancellation. The prior final decree adju that the Trustees had a lien on all the property of the pany for this sum. The question, therefore, is whether subsequent judgment of the court, inconsistent with a judgment before made based upon no new pleadings, i erroneous, the prior final judgment not having been o or in any manner set aside. Under these circumstanc last judgment must be reversed. The two cannot sta gether. A judgment that the one hundred and three constitute, in the hand of the defendant company, n against the fund, is inconsistent with the judgmen lishing a lien in favor of the Trustees for that sum, a that judgment there is no appeal here. As to the n controversy, the judgment of April 2, 1874, was *re cata*, until reversed or vacated. (35 Barb., 214. cannot be in the same proceedings two inconsis judgments against the same defendant, based upo pleadings by the same plaintiff. If, without o setting aside the first final judgment, a second i one can be entered, why cannot a third and four

tent final judgment be entered? With such a rule there would never be an end to litigation.

This judgment of August 20, 1875, must be reversed as to the J., P. & M. Co., in so far as it adjudges the one hundred and three bonds to be the property of the Trustees of the Internal Improvement Fund, subject to be cancelled. This, however, to be without prejudice to any right which said Trustees may have, or to any application they may make to reform or change, upon proper proceedings, the judgment of April 2, 1874.

We next examine the appeal of Milton S. Littlefield. Plaintiffs allege in their original complaint that "they have been informed and believe that Milton S. Littlefield has in his possession and control a large number of the first mortgage bonds of the said Pensacola and Georgia Railroad Company, for the payment of which the balance of said urchase money is, when collected, made applicable by law, nd that the defendant, M. D. Papy, holds another large umber of the last aforesaid bonds as the agent of the said ailroad Company, or of the said defendant, George W. vepson, all of which said last mentioned bonds equitably long to the Trustees of the Internal Improvement Fund." The prayer of the original complaint was for judgment ainst the J., P. & M. R. R. Co. for the sum of $572,000 l costs, and for an injunction restraining M. D. Papy and ton S. Littlefield from parting with the possession and n disposing of, or in any manner incumbering the bonds w in their possession, custody and control, either as tees or otherwise," until the further order of the court. re was an injunction awarded against Papy and Littlein accordance with the prayer of the bill, as to any of bonds of the Pensacola and Georgia Railroad Com-

e summons issued upon the filing of this complaint was 1 upon Milton S. Littlefield on the 20th of March, 1872.

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There is no evidence in this record of any appearance by him. An amended complaint as called by the plaintiff, an amended and supplemental complaint as named by the court, was filed June 22, 1872. In this the Trustees alleged that the said Jacksonville, Pensacola and Mobile Railroad Company, or the said Littlefield, hold by purchase one hundred and three thousand dollars of the outstanding P. & G. & T. R. R. Co. bonds, purchased under an agreement that the same should be surrendered for cancellation to and by the said Trustees, and that while the J., P. & M. Co. is liable for the sinking fund, yet the said bonds are valueless in its hands or in the hands of its assignees. No notice of intention to file this complaint, or of an application for leave so to do, or of its being filed, was served upon the defendant Littlefield.

The record contains an acknowledgement by M. S. Littlefield of service of notice by the plaintiffs of their intention to apply for final judgment against him, and on the day named in this notice there was a final judgment, this final judgment reciting that defendant, Milton S. Littlefield, had been duly served with process in this action, had not interposed any defence thereto, adjudged as against him that the one hundred and three bonds of the P. & G. & T. R. R. Companies were the property of the Trustees, that the plaintiffs should cancel them upon receiving possession of them, and perpetually enjoining Littlefield from asserting any right or title to them.

From this statement of the case of appellant Littlefield, it appears that the judgment rendered against him was for default for want of "defence;" that the original complaint was filed March 22, 1872; that he was served with summons on the 20th of March, A. D. 1872; that on the 22d of June, A. D. 1872, an amended complaint was filed of which no notice was given him; that he never entered an appearance

in the cause, and that he received notice of intention to apply for final judgment against him.

Does an appeal lie from such a judgment in this State? Under the original text of the Code, as interpreted by the courts of New York, an appeal did not lie from a judgment by default. (4 Com., 315; 8 Barb., 351; Voorhee's Cod,e 668; ib., 665*d*.) Under the English system an appeal did not lie from a decree *pro confesso,* and such was the rule in New York, Maryland, New Jersey, and Vermont. (2 Smith's Chy. Practice; 54 N. Y., 27; 8 Wend., 219; 25 Wend., 245; 12 John., 493; 1 Beas., 353; 1 Bland, 12-35; 15 Vermont, 378.) In this State a defendant anterior to the Code could appeal from a decree *pro confesso,* and in one case it was held that the appeal would only bring up for review the proceedings prior to the default. (4 Fla., 11.) The difference in the rule as stated by the court was occasioned by the fact that in England and New York an appeal might have been taken from interlocutory orders and decrees, while in this State no such appeal could be taken. Having failed to take an appeal from an interlocutory order when it could be done, the party in the English courts was considered as acquiescing in the propriety of the decree, and a subsequent default would debar him from bringing any question in the cause before the appellate tribunal. Under our first statute, however, an appeal could only be taken from a final decree, and for this reason the court, contrary to the rule in England and New York, held that an appeal could be taken and that every question passed upon by the Chancellor, and the regularity of the proceedings therein prior to the default, could be reviewed. (4 Fla., 14.) This statute was afterwards modified (A. D. 1853,) and appeals from interlocutory orders were allowed. This court, in the case of Freeman vs. Timanus, (12 Fla., 403,) held that this last statute did not change the rule, as it provided that a postponement of the appeal until final decree should not be

held to be an acquiescence, and in that case the decree was reversed and the case remanded with directions to dismiss the bill. In that case also we held that under the statute regulating decrees upon bill taken for confessed, the court could not grant the decree asked unless such decree under the statute was proper and consequent from the matter of the bill. We also held that in making a decree in conformity with our statutes there was necessarily the exercise of judicial judgment, the plaintiff not being allowed to take such decree as he could abide by. (12 Fla., 403; Thomp. Dig., 457.) Section 202 of the Code, as amended by the act of January 27, 1871, provides that appeals may be taken "from all such interlocutory as well as final orders and judgments in like cases as appeals could be taken before the passage" of the act establishing the Code practice; and as an appeal could have been taken from a decree *pro confesso* before the Code, so now it can be taken from a like judgment since its enactment.

Upon such appeal we do not think that the appellant can do more than question the sufficiency of the case made by the plaintiff of which he has had notice. To this extent he has made default and to such extent must he suffer, but the plaintiff cannot take any judgment he pleases. The judgment must conform to the cause of action stated against him. (22 Wis., 438; 14 Wis., 16; 1 Cal., 97; 3 Scam., 349; 1 C. Green, 271; 6 Mass., 499; 1 Morris, 290; 4 R. I., 114; 3 Nev., 385; 9 Iowa, 201; 30 Ga., 503; 9 Paige, 322; 18 Ark., 209; 2 Ark., 26.) In this case the defendant Littlefield received notice of the original complaint; he did not receive notice of the amended complaint. If the original complaint sets up a cause of action, then a judgment conforming thereto will not be disturbed here. If, however, the original complaint sets up no cause of action, and the judgment is based upon the amended complaint of

which he received no notice, it is error and must be reversed.

Plaintiffs in the original complaint alleged "that defendant Littlefield had in his possession and control a large number of the first mortgage bonds of the said Pensacola and Georgia Railroad Company, for the payment of which the balance of said purchase-money is, when collected, made applicable by law." This allegation, instead of making a case against defendant Littlefield, sets forth plainly that he is entitled to a part of the moneys which the plaintiffs seek to recover. In the amended complaint, of which Littlefield received no notice, the plaintiffs alleged that the J., P. & M. Co. or Littlefield held by purchase one hundred and three of the outstanding P. & G. R. R. Company bonds, purchased under an agreement that the same should be surrendered for cancellation to said trustees. Upon this allegation the final judgment was based. Of this claim Littlefield received no notice. The amended complaint making it was filed three months after the original, without notice or without leave of the court. Under these circumstances this judgment must be reversed. Unless this is the rule, the plaintiff in a bill seeking a specific performance of some simple contract might, by an amendment without notice and without leave, change the bill into one seeking a foreclosure of a mortgage and have a decree for the sale of the entire estate of the defendant. It cannot be said that defendant has confessed a claim of which the record discloses no notice to him. His only protection in such cases is notice of the claim for which judgment is demanded, and the court should only grant a judgment when the record discloses this fact affirmatively. We do not think that either party should be prejudiced by this proceeding. While we doubt whether an order directing the bill to be dismissed as to defendant Littlefield would prejudice any right of the trustees against him, still to avoid any difficulty the order

will be for a dismissal without prejudice to any right which the trustees or the State may see proper to assert against him in any other proceeding. The following judgment will be entered in this case:

This cause having been submitted at a previous term of this court, after argument by counsel for the State of Florida and for the Trustees of the Internal Improvement Fund, the plaintiffs, as well as after argument by counsel for defendants, the Jacksonville, Pensacola and Mobile Railroad Company and Milton S. Littlefield, and the transcript of the record of the judgement aforesaid having been seen and inspected, it is considered by the court that there is error in said judgment as to the Jacksonville, Pensacola and Mobile Railroad Company, and as to the said Milton S. Littlefield; wherefore it is ordered, adjudged and decreed that said judgment be reversed as to each of said defendants, and that the case be remanded with directions to dismiss the bill so far as in behalf of the State as a holder of the bonds of the Jacksonville, Pensacola and Mobile Railroad Company as to said defendant, the Jacksonville, Pensacola and Mobile Railroad Company, without prejudice to the right of the State of Florida as trustee to assert in another proceeding against said defendants, or either of them, a lien subordinate to the lien of the Trustees of the Internal Improvement Fund as to the several roads extending from Quincy to Lake City, with branch to Monticello, and from Tallahassee to St. Marks, and without prejudice to the right of the State of Florida to assert in a new proceeding a general lien as trustee upon all other property of the Jacksonville, Pensacola and Mobile Railroad Company, and without prejudice to the right of the plaintiffs, or either of them, to reform or change, upon proper proceedings, the judgment entered in this case on the second day of April, in the year of our Lord one thousand eight hundred and seventy-four, and without prejudice to any right which the plaintiffs, or

either of them,may see proper to assert against the defendant, Milton S. Littlefield, in this or any other proceeding; and for such other proceedings as are conformable to law and consistent with the opinion and judgment of this court in this cause. It is further considered that defendants recover of the plaintiffs, the Trustees of the Internal Improvement Fund, the costs of their proceedings by them expended in the Circuit Court of Duval county and in this court subsequent to the judgment of April second, in the year of our Lord one thousand eight hundred and seventy-four, so far as they arise out of the claim of the plaintiffs, Trustees of the Internal Improvement Fund, of and to the one hundred and three bonds of the Pensacola and Georgia and Tallahassee Railroad Companies taxed at the sum of———dollars and —— cents in favor of the defendant, the Jacksonville, Pensacola and Mobile Railroad Company, and at the sum of ——— dollars and —— cents in favor of defendant, Milton S. Littlefield. It is further considered that the costs expended by the defendant, the Jacksonville, Pensacola and Mobile Railroad Company, in this behalf, in connection with the claim of the State of Florida, be taxed by the Clerk of this court as against the State of Florida, and that a statement thereof be filed in the papers in this cause.

BURTON W. BELLAMY, APPELLANT, VS. ALEXANDER B. HAWKINS, APPELLEE.

Bill filed by an executor against a co-executor to recover a *pro rata* share of compensation and commissions allowed by the order of the probate court and paid to and retained by the co-executor, who refused to pay over the share claimed by the complainant: *Held*, That the remedy at law is plain and adequate, no discovery is necessary, and chancery has no jurisdiction.

Appeal from the Circuit Court for Leon county.

The bill of complaint alleges that Hawkins, the defendant, received into his own hand and possession nearly all the assets of the estate, consisting of moneys and bonds, and has continued to hold and control the same, and to make investments with said money without permitting Bellamy and the other executors to participate therein, and without consulting him; that Hawkins has used Bellamy's name as co-executor when necessary, and procured Bellamy's signature to receipts and deeds and other papers when necessary; that Bellamy has performed every act on his part that would be to the advantage of the estate; that Bellamy has had great anxiety on account of the administration, and put himself to a great deal of trouble to find out what investments were made by H. and how made, and that Bellamy "being satisfied," he "made no objection thereto;" that he (Bellamy) has often requested Hawkins to divide the assets with him, but that Hawkins refused to divide the assets or allow him to co-operate with him in the management of the moneys, bonds or other assets; that as Bellamy shared the responsibility he was willing also to share the labor; that notwithstanding the long administration and the great responsibility of Bellamy through long series of years, and notwithstanding his willingness to share in the said administration, prevented by Hawkins as aforesaid, Hawkins has not allowed him his share of compensation and allowances, but took all the allowances and also extra allowances, and kept them for his own use without giving anything to Bellamy; that Hawkins gave part of the commissions and allowances to the two other executors, Denham and Bailey, and Bellamy himself has not received any of the commissions and allowances, and charges that the other two executors "performed little or no part in the administration," for the same reason as Bellamy, they being prevented; that commissions and allowances from commencement of admin-

istration amount to about $17,000, and that complainant is entitled to one-fourth up to A. Z. Bailey's death, who died in September, 1871, and from death of A. Z. Bailey to death of William Denham, who died in August, 1873, one-third, and one-half from death of William Denham until the close of administration; that testator appointed four executors that each should be a check on the other, but it was not his desire that Hawkins should take charge of all the assets, but that in the event all would not participate actively in the administration, that those who were so engaged should have an eye to the work and see that it was properly done, and all should receive a just compensation; and if one chose to perform all the work and control all the assets, that he should share the commissions and allowances with the others; that complainant has often requested Hawkins to divide commissions and allowances, or even to permit him to participate in the administration of the estate; that defendant pretends that complainant is not entitled to any commissions or allowances, or even any compensation, because he says complainant has not done much or anything in the administration of the estate, while "complainant charges the contrary to be true," and alleges "that he would have done his part in the said administration if defendant had permitted him;" that defendant received all the assets of the estate and invested them without consulting complainant; making returns annually without consulting or informing complainant, and keeping all the commissions and allowances; that defendant has not put down in his returus all the commissions to which the executors were entitled, to-wit: the enhanced value of the bonds since the investments were made; that Bellamy's "name has been used to receipts and deeds and other writings, which could not be done without complainant's signature," and that "the same represented large amounts of money;" that defendant has received all the commissions without dividing with complainant.

The prayer of the bill is that Hawkins "be decreed to render a just and fair account of all and singular the moneys he has received as commissions and allowances from the said estate," and "show what investments he has made and the profits arising therefrom," and reference be made to a master to take and state an account of all said matters and things, and that Hawkins be decreed to pay complainant whatever amount he may be found due as part of said commissions and allowances, and prayer for general relief.

Angus Paterson and *White & Bryson* for Appellant.

Geo. P. Raney for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This cause was heard by the Chancellor upon the pleadings and proofs, and the court found that the complainant is not entitled to recover anything of the defendant; that he has received from the estate of William Bailey, the testator named in this cause, at least full compensation for all services rendered by him to the said estate, as shown by the evidence, and thereupon decreed that the complainant's bill be dismissed with costs.

We have examined the record and considered the authorities refered to, and must express our regret that the parties have been at such labor and expense as they have subjected themselves to in this case without a practical result.

There is nothing in the case to show that the complainant may not have a plain and adequate remedy at law to recover the demands set up in the bill, by an action for money had and received, in which the respective causes of action and defence may be submitted to a jury, which is the proper tribunal to determine them.

The claim is, that Hawkins, one of the executors, has received out of the estate of Bailey, deceased, certain sums of

money, which was ascertained, adjudged and allowed by the Probate Court as commissions and compensation to which all the executors were entitled by the statute, and that complainant, being one of the executors, is entitled to certain easily-ascertained share. There is no such complication of accounts or concealment of facts by the defendant possible, according to the case made, which makes a discovery necessary, because all the facts are contained in the record and proceedings of the Probate Court. Courts of equity will entertain jurisdiction in matters of account when there are mutual accounts, and also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account and is obtained; but in such a case, if no discovery is asked or required by the frame of the bill, the jurisdiction is not maintainable. (1 Story's Eq. Jur., §458 and notes.) It is not every account which will entitle a court of equity to interfere.

It must be such an account as cannot be taken justly and fairly in a court of law. Ib.; see also Story's Eq. Pl., §§473-479, and authorities; 1 Daniel's Ch. Pl. & Pr., 3 Am. Ed., 575, n. 1.

Ogle vs. Haddock's adm'r, 1 Vesey, 162, was a bill for an account and division of prize money. The Lord Chancellor says, "There is no ground to come here for an account, the sum being certain, and, therefore, no necessity to decree for the plaintiff if his right was stronger; being a mere legal right which should be recovered at law."

In Phillips vs. Phillips, 9 Hare, 471, the Vice-Chancellor says: "I take the rule to be that a bill of this nature will only lie where it relates to that which is the subject of a mutual account, and I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two persons had received money and paid it on the other's account. * * Where one party has merely received and paid mon-

eys on account of the other, it is a simple case. * * The question is only as to the receipts on one side and the payments on the other, and it is a mere question of set-off; but it is otherwise where each party has received and paid;" and in Porter vs. Spencer, 2 Johns. Ch., 169, it is held that to sustain a bill for an account there must be mutual demands, and not merely payments by way of set-off; there must be a series of transactions on one side and payments on the other. 'Also in Pearl vs. The Corp. of Nashville, 10 Yerg., 179, it is said that account is a head of equity jurisdiction; but it is so only in cases where there are mutual accounts, and not where the items are all on one side. See also Foley vs. Hill, 1 Phillips, 407: "A party has no right to come here upon a simple transaction of this kind, when justice may be administered in a more simple way and at less expense in a court of law." In that case the parties were before the court upon bill, answer and proof, and the bill was dismissed upon the ground stated.

But it is unnecessary to cite further authorities; the question is entirely settled by the courts in England and in this country, and it is only necessary to refer further to sections 457 to 459 of the late edition of Story's Eq. Jur., and to Daniel's Ch. Pl. & Pr., (3 Am. Ed.,) 575 and notes.

The decree (without reference to the conclusions of the court upon the facts) dismissing the complainant's bill is affirmed, without prejudice to his right of action at law.

E. M. TUNNO AND M. K. JESSUP & CO., APPELLANTS, VS.

A. CAMPBELL ROBERT, APPELLEE.

1. Where a party has agreed to do certain work, furnish certain materials, and keep certain premises in repair, and he fails fully to perform his

agreement, yet if the work done and material furnished are of value and are accepted by the other party, he is entitled to recover a *quantum meruit* for his work and a *quantum valebant* for his materials. The owner, however, should be held to pay in damages only so much as will make the sum agreed to be paid good, deducting the loss or damage occasioned by the variation from the contract. After a partial performance the rights under such an agreement may be assigned, unless it involves a personal confidence or there is something of a fiduciary character in the transaction.

2. A mortgagee seeking the foreclosure of a mortgage can have only such debts established as are within the terms of the mortgage.

3. Where a party stipulates to pay a given sum for a defined service and no date is named for payment, the amount becomes due upon the performance of the service contracted for.

4. An agreement by which a party enters upon the land of another, and performs labor and service thereon, is not an agreement by which an estate in land is created. Such an agreement to be performed in five years is a personal contract and is valid if in writing, signed by the party to be charged.

5. Such a contract held by a husband and partially performed, may be assigned to the wife under the Constitution and laws of Florida, in payment for her separate moneys advanced to him, and to the extent that he had a right, she can have a remedy. Such an agreement, not negotiable, is a chose in action to which the wife under our laws can in equity acquire a valid title from the husband.

6. Where such a chose in action is, by the instrument of transfer from the husband to the wife, made payable to the *wife's assigns*, upon an assignment by her such authority from the husband is sufficient evidence of the assent of the husband to her subsequent transfer or assignment of the chose in action to comply with the requirements of the statute regulating transfers of personal property of the wife.

7. The statute which provides that the husband and wife shall join in all sales, transfers and conveyances of the property of the wife, and the real estate of the wife, considered in reference to the personal property of the wife. Thomp. Dig., Sec. 5, 221.

8. The assignee of a chose in action stands in the place of the assignor, subject to all the equities between the parties.

9. The statute of this State (Chap. 1983, Laws,) provides that no person interested in the event of an action, shall be examined as a witness in regard to any transaction or communication between such witness and the person deceased at the time of his examination, against the assignee of such deceased person. In this case the mortgagee being

dead, an interested party cannot be a witness as to any transaction with the mortgagee as against a party deriving by assignment from the mortgagee.

10. "Proof by affidavit to the judge" that the order requiring a defendant resident of another State to appear and answer has been published in the manner and for the time prescribed by law, is one of the requirements of the statute in order to perfect a constructive service. This proof must be made before the judge can grant an order taking the bill for confessed.

Appeal from the Circuit Court for Madison county.

The written assignment by U. M. Robert to his wife, Rachel C. Robert, was endorsed on the mortgage, and after reciting the receipt of moneys and "other valuable consideration," is as follows: "I have assigned, transferred, and set over the within mortgage and land to the said Rachel C. Robert, to her heirs and assigns, hereby transferring all my interest and estate mentioned therein to her heirs and assigns." It was executed May 11, 1870, is witnessed by two witnesses, and recorded May 17, 1870, being acknowledged before the clerk by U. M. Robert for record.

The defence set up, involving the Guilmartin & Co. claim mentioned in the opinion, is to the effect that W. M. Tunno, the son of the complainant, E. M. Tunno, endorsed for U. M. Robert to enable him to obtain supplies from Guilmartin & Co. to run their farm for the year 1871, and that Robert obtained a large amount of supplies from G. & Co., but did not pay for them, but left a balance of $738.18 and interest unpaid, which amount "has been duly paid, or secured to be paid, to said G. & Co." That such endorsement was made in pursuance of an original understanding that it should be recognized as a legitimate set-off or demand against any claim U. M. Robert might have on said mortgage obligation, and that said balance of $738.18 is an equitable set-off against the claim. A member of the firm of G. & Co. testified that W. M. Tunno introduced Mr. U. M. Robert, and the advances were made upon Mr. T.'s guar-

anteeing their payment, and Tunno has paid $350 on the indebtedness; that there is a balance due, and they consider Mr. T. liable for it; they did not know what reason moved Mr. T. to become guarantor for Mr. R.; knew nothing about the mortgage, and had no contract in reference to it.

Chapter 1983 of the Laws of Florida provides that "no person offered as a witness in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto: *Provided, however,* That no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person desires [derives]any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and the person at the time of such examination deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, divisee, or survivor of such deceased person, or the assignee or committte of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, divisee, survivor, or committeemen shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."

The other facts are stated in the opinion of the court.

E. J. Vann for E. M. Tunno.

Geo. P. Raney for Jessup & Co.

Angus Paterson for A. C. Robert.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case two appeals are presented by the appellants named from several interlocutory decrees and a final decree for the foreclosure of a mortgage given by appellant E. M. Tunno to U. M. Robert to secure the payment of the following obligation. There is no final decree against M. K. Jessup & Co.:

SAVANNAH, GA., February 10, 1869.

STATE OF GEORGIA,
Chatham county.

WHEREAS, I, Elizabeth M. Tunno, of the State and county mentioned, own and possess a plantation and tract of land in Madison county and State of Florida, known as Orange Hill; and whereas, said plantation is very much out of repair and becoming less valuable every year from trespass and neglect; and whereas, U. M. Robert, of Madison county, Florida, has agreed with me to go upon the said plantation and repair, refit, and pay the taxes and keep it in order; now be it known that I, Elizabeth M. Tunno, in consideration of the premises, hereby obligate myself to the said U. M. Robert to pay him the sum of one thousand five hundred dollars and guarantee the possession of the said plantation for the term of five years, free of rent.

ELIZABETH M. TUNNO.

Under the terms of this instrument, U. M. Robert entered into possession of the plantation.

On the 25th of February, A. D. 1871, an inspection of the premises was had by J. C. McGehee, and he valued the improvements and repairs at $2,250. When examined subsequently as a witness in the cause, these improvements are placed by him at a smaller figure.

The mortgagee used in constructing these repairs and improvements over six hundred dollars of the money of his wife, Rachel C. Robert. In addition to an advance of this

sum, she paid some of the taxes. In consideration of these sums so paid, the mortgagee executed, on the 11th day of May, A. D. 1870, a formal written assignment and transfer of the mortgage to her, and on the 5th day of February, A. D. 1872, she executed a like formal transfer of the mortgage to her son A. C. Robert, the plaintiff in this case, reciting as a consideration therefor moneys advanced to her by her son, which the evidence shows amounted to about eight hundred dollars. The agreement to pay fifteen hundred dollars was transferred to him by delivery simply, without any formal assignment. The transfer was absolute. Under our statute such a mortgage is transferable, with right of action in the assignee. This, with the possession of the contract, give the plaintiff a standing in a court of equity. (30 Mich., 499; 29 Mich., 10.) The testimony, so far as it relates to the particular defences urged, will be stated as we discuss each question raised.

The first question raised is, whether there is any right of action in the assignee, it being insisted that there was no performance of the contract by the mortgagee or his assignee. The instrument is an agreement upon the part of U. M. Robert to go upon the plantation and repair, refit, pay the taxes, and keep it in order. There was, as the testimony discloses, a part-performance by U. M. Robert before he died. He did enter upon the place and repair and refit it, but the place was not kept in full repair either by him, U. M. Robert, his assignee, or by A. C. Robert, her assignee, and the taxes were not paid during two years of the five years of the term. We do not think the failure to pay the taxes is an act which should work, under the beculiar circumstances of this case, an absolute forfeiture, thus enabling the mortgagor, after standing by and permitting possession to the end of the term, to avail herself of all the benefits which accrued to her real estate. A proper

credit can be allowed for this sum in the adjustment of the account.

The rule as to such contracts as this is, that while the party cannot recover the price agreed upon in the contract, yet if the work and materials and the acts done are of any value and benefit to the other party, and are accepted by defendant, the plaintiff may recover on a *quantum meruit* for the work done and on a *quantum valebant* for the materials. The rule is that the owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the sum agreed to be paid good, deducting the loss or damage occasioned by the variation from the contract. 7 Green, 78; Bull., N. P., 179; 7 East, 479; 6 N. H., 481; 8 Pick., 178; 7 Pick., 181; 5 Ohio, 349-51.

There are conflicts in the cases upon this subject, but we think the correct rule is where the party, as in this case, gets the consideration of a defective execution and accepts it, he should be held to a reasonable charge.

In this case the evidence shows that there was a defective execution, and it was decreed by the court that the sum of four hundred and fifty dollars be credited on the contract, that sum being deemed sufficient to put the plantation in full repair.

Some of the witnesses for the defence swear that in 1874 it was no more out of repair than the generality of places in the country, that the negro-houses were in tolerable condition, &c.; but without reference to this we think, under all the circumstances, the Chancellor was justified in allowing the mortgagee the credit for the large sum. It appears also that the taxes were paid for one year not embraced in the term by the mortgagee or his assignee, and that the mortgagee and his assignees failed to pay the taxes for two years embraced in the term. The decree as rendered fails to charge the assignee with taxes not paid for two years.

It charges him with the taxes for one year only, allowing a credit for the taxes paid for a year not embraced in the agreement. This was not correct. A mortgage cannot thus be extended to a debt not embraced in its provisions where the mortgagee is seeking a foreclosure. 5 Gill. & John., 21.

The bill here seeks a foreclosure based upon the terms of this contract and mortgage, and no debt, except such as is authorized by it, can be decreed to be paid under it. He should be charged also with any expense, such as advertisements paid in connection with two years taxes.

Again, as we are treating of matters as to which the plaintiff should have been charged in the accounting, we deem it proper to dispose of the question of interest upon the $1,500 agreed to be paid under the contract. This court cannot agree with the view that the $1,500 became due upon a part-performance of the contract by the mortgagee, or that it was due upon its execution. The Chancellor found that when the place was put in full repair, the $1,500 was due. The contract, by its express terms, was for a possession of five years, and one of the considerations for the $1,500 agreed to be paid was that the place should be kept in repair. Until the expiration of this period, the sum agreed to be paid was not due.

The next question raised in the case is, whether this contract was assignable by the husband to the wife by simple writing signed by the husband without deed.

This contract is not in form a lease, nor it is an instrument by which an estate or interest of freehold or for a term of years of more than two years, or any uncertain interest of, in, or out of any messuages, lands, and tenements, is created, within the meaning of that section of our statute of frauds (Thomp. Dig., 177,) requiring a deed and two witnesses to pass such estate. It is an agreement to pay the sum of $1,500 to a party if he will enter upon certain lands and

do certain named acts in reference to said lands in the space of five years. Such an agreement is effective under our statute of frauds, (Thomp. Dig., 218,) to authorize an action, if in writing and signed by the party to be charged. It is simply a personal contract, an agreement by which a party enters upon the land of another and performs labor and service thereon. No such interest in the land passes as requires a deed. The next question raised in this case is, whether under our Constitution and laws such a contract is assignable by the husband to the wife. It appears from the evidence that there was a part-performance of the contract by the husband, who was to do the repairs upon the place, that separate moneys of his wife paid for a large portion of the improvements, and that an absolute transfer of the mortgage, duly executed, was made in consideration of this sum. Under the provisions of the Constitution (Art. IV., Sec. 26,) she had the power and right to acquire this interest. Mercer vs. Hooker, 5 Fla., 279.

It was a chose in action. Where the husband has repaid money loaned him by his wife, or transferred to her property in satisfaction of a just claim, she acquires a valid title which a court of equity will enforce. 44 N. Y., 298; 51 N. Y., 395; 51 Ill., 325; 7 Bush, 394; 29 Wis., 136; 2 Story Eq., 1372 to 1374.

The next question is, whether there was power in the wife to assign to plaintiff this chose in action, without the express written joinder of her husband in such assignment?

Section 4, Act of March 6, 1845, (Thomp. Dig., 221,) regulates the sale and transfer of the property of a *femme covert*. This section provides that "the husband and wife shall join in all sales, transfers and conveyances of the property of the wife, and the real estate of the wife shall only be conveyed by the joint deed of her husband and wife duly attested, authenticated and admitted to record, according to the Laws of Florida regulating conveyances of real proper-

ty." (Thomp. Dig., 221, §5.) The first clause requires the husband to join in the sale or transfer *of the property* of the wife; the second makes an express additional provision as to the disposition of her *real* property, restricting the method to a deed duly attested, &c. The term property, as used in the Constitution, has been held by all of the courts, construing similar provisions upon the same subject, to embrace personal as well as real property, embracing choses in action, the property here involved. 14 East, 370; 19 Minn., 338; 2 Cal., 289; 35 Ala., 653; 4 Allen, 342; 1 C. E. Green., 512; 1 La., 1; 32 Conn., 1; 14 Iowa, 30; 32 Md. 214; 24 Miss., 245; 31 Barb., 132; 99 Mass., 561.

It should be limited in its signification by the words with which it is found connected. (11 East, 290-296.) The context here makes it clear that it embraces personal property generally, and we are inclined to the view that it includes a chose in action of the wife; but without expressly deciding this question (as it was not even alluded to in the argument) we are of the opinion that in this case there have been such acts of the husband as will amount to a joining in the transfer or assignment the wife made of this chose in action, within the meaning of this statute. This section must receive a liberal construction in view of the character of personal property. The muniment of title by which it is held is not of so high a character as that required to evidence ownership of real estate. A majority of commercial transactions, involving sales or transfers of personal property, are not evidenced by writing. The title passes by delivery, without any formal written instrument. It was not the purpose or the effect of this statute to change this rule, and require a formal written instrument to pass the title. It must, therefore, receive a construction consistent with this fact. Assent by the husband to such sale or transfer by the wife, either express or implied, must, therefore, be effective to

divest the title of the wife and to constitute a joinder of the husband.

Take the case of a wife having a gift of fifty dollars as her separate property under the Constitution. Is she, in the event she desires to purchase some articles for domestic use, required to execute a formal instrument, in which her husband joins, transferring her interest in the money to the vendor?

In the present case a formal assignment was executed by the wife, and the rule to be applied to it may be different from that applied to an ordinary transfer of the property of the wife without any such formal instrument. In this case the husband assigned the chose in action to the wife by a written instrument, in which he authorized her to assign and transfer it to another party. This, we think, shows the written assent of the husband to this act of the wife, and as it was unnecessary to have any formal deed or written instrument to make such an assignment, (as such assignment may be by parol,) we think it was a joining within the meaning of the statute, even admitting its application to the present case.

The next question is, whether such a contract for service in the construction and repair of those buildings and the protection of the plantation is, in its nature, assignable? This contract had been partially performed by the mortgagee, through the assistance of his wife, before the assignment. A large part of the repairs was done in fact under his supervision and through the assistance of her funds, even after the formal assignment. In general the benefit of an agreement may be assigned in equity. Where there is some personal confidence in the contract, or it is of a fiduciary character, (14 Conn., 344, C. John. Chy., N. Y., 469,) or where the contract contains a provision against assignment, or where the assignment is illegal or contrary to public policy, then it cannot be upheld. Fry on Spec. Perf., 107.

Under the circumstances of this case we cannot find that it is embraced in these, or any of the other exceptions to the general rule announced.

The next question is as to the effect of the assignment of this chose in action. It was not negotiable paper. The rule is that the assignee of a chose in action stands in the place of the assignor, subject to all the equities between the parties. 2 Wash., 317; 1 Dall., 23; 2 John., 612; 19 E. L. & Eq., 97; 16 Wall., 276; 1 Ves., Jr., 249; 63 Ill., 485.

The claim of Guilmartin & Co. has no connection with the mortgage. They say expressly that they know nothing of it.

The only other equity claimed here arises out of fraudulent transaction alleged by the defendant to have existed between the mortgagee in this case, herself and her son, Wm. M. Tunno. It appears that the land which was the subject of this mortgage was originally purchased by the son of the defendant, and that when he became embarrassed he gave it to his mother, the defendant. The defendant alleges that the present contract and mortgage was all a sham executed to protect this property, and that in fact, contrary to the express terms of the agreement, nothing was to be paid to the mortgagee by her for his services in repairing the houses and putting the plantation in order; that he was indebted to her son for advances before that time made to him, and that the mortgagee, who was the assignor of the plaintiff's assignor, and in whose place the plantiff stands, agreed to take his own debt to her son in payment of his debt to her. This is the testimony of her son, W. M. Tunno. This witness has a direct interest in establishing the fact that the debt secured by this mortgage is the debt due him by the mortgagee, and for that reason his testimony should, under all the circumstances, not be regarded with that degree of credit which attaches to the testimony of a disinterested witness. Again, we would

not feel disposed to give effect to an admitted fraud against his creditors. As to this, however, we do not say that this might not be an equity as against this plaintiff if sustained by legal evidence.

The only testimony here to establish this fact is that of Wm. M. Tunno to the declarations and agreement of the deceased mortgagee.

As against an assignee of the mortgagee, this testimony is inadmissible. Chapter 1983, Laws.

The assignor of the plaintiff was the mortgagee's assignee, and the plaintiff is entitled to stand in his place. The statute expressly provides that no such person shall be "examined as a witness" in regard to such communication or agreement of the deceased party, and while we perceive no objection by the plaintiff in this record to such examination, still in a suit in equity we deem it our duty to regard and enforce the express provision of the statute covering the subject.

The decrees against the defendant, E. M. Tunno, must be reversed for the reasons stated.

We next treat the appeal of M. K. Jessup & Co. There is no decree in this record against these parties signed by the judge. There is an entry in the record ordering the bill to be taken for confessed signed by plaintiff's attorneys. Anterior to this, there is an affidavit by plaintiff's attorneys that M. K. Jessup & Co. reside in New York, as shown by the return of the sheriff, that they are not to be found in the county, and a suggestion that they reside in New York, and there is an order of publication by the judge. There is no evidence by "affidavit to the judge" that any publication was ever made of this order. This is a requirement of the statute in order to perfect a constructive service in such cases, and it must appear in the record; nor is there any authority in such cases for an order taking the bill *pro confesso* to be entered by the plaintiff's attorneys. It must be

granted by the judge. (Thomp. Dig., 452.) The persons composing the firm of M. K. Jessup & Co. having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process. 13 Fla., 368; 1 Pike, 50, 376, 386, 405; 4 Bibb, 84, 167.

The decrees of the 21st day of February, A. D. 1877, and of the 16th day of July, 1877, and the order taking the bill as confessed against M. K. Jessup & Co., are reversed and set aside, and the case is remanded for further proceedings conformable to law and not inconsistent with this opinion.

A. F. FINLAYSON, APPELLANT, vs. JOHN B. LIPSCOMB, APPELLEE, AND JOHN B. LIPSCOMB, APPELLANT, vs. A. F. FINLAYSON, APPELLEE.

1. A cross bill is a pleading which necessarily precedes a final decree. Up to the hearing it is proper for the court upon proper showing under oath to permit such a bill to be filed. It is proper so to do when it appears that the suit as instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of the parties.

2. Leave to file a supplemental bill in the nature of a bill of review should not be granted in a case where it is apparent that for months before publication and hearing, a reasonable degree of diligence on the part of the party would have resulted in his ascertaining the new evidence proposed to be brought forward. Where the new evidence appears to be the testimony of named witnesses and the other requirements of the law are complied with, the petition should be accompanied by the affidavits of such persons to the new facts alleged, or some good reason be given why they were not produced. Some of the cases upon the subject of leave to file a supplemental bill in the nature of a bill of review considered.

3. Where, in a foreclosure suit, the defense is a satisfaction of a mortgage debt, and the evidence in the case upon the part of the plaintiff con-

sists of the debt established by judicial proceedings and outstanding up to the institution of the suit, the mortgage, and plaintiff's denial of any payment or satisfaction, and the evidence upon the part of the defendant is his own testimony in direct conflict with this written evidence and the testimony of the plaintiff, the testimony of defendant's son, which is uncertain and indefinite, and to part only of a conversation between the parties, and the testimony of a third party not plainly in conflict with plaintiff's testimony, the court should find for the plaintiff. Especially is this true when the assault upon the mortgage debt involves the regularity and propriety of proceedings in a collateral suit. Under the peculiar circumstances of this case the decree is affirmed without prejudice to any right to proceedings which the defendant may have, looking to re-sale of the property alleged to have been sold by the fraud and covin of the plaintiff at a price less than its value, or to file an original bill to set the sale aside, or to his action for damages.

Appeal from the Circuit Court for Madison county.

The facts of the case are stated in the opinion of the court.

S. Pasco for Finlayson.*

A. Paterson for Lipscomb.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a bill brought by W. J. Hines and A. Florida Finlayson, appellants, against John B. Lipscomb, to foreclose a mortgage upon lands in Madison county.

Plaintiffs allege that defendant executed to plaintiff, W. J. Hines, as executor of the last will and testament of John Finlayson, late of Jefferson county, deceased, his deed of mortgage upon certain lands described. Plaintiffs allege that on the 23d of March, 1870, Lipscomb, Dickinson, and

*This case was before the Supreme Court on appeal at January Term, 1876, and is incorrectly reported in 15th Florida Reports, 558, as H. F. Finlayson, Appellant, vs. John B. Lipscomb, Appellee. The counsel are also incorrectly reported there. Mr. Pasco represented the *appellant* and Messrs. Paterson & Pope the *appellee* in that appeal. This correction is made at the request of Mr. Pasco.—REPORTER.

Ardis executed their promissory note to W. J. Hines as executor for the sum of $4,656 gold coin; that to secure payment of the same these parties executed a mortgage upon certain lands in Madison county; that on the 23d of July, 1870, the mortgagors applied to plaintiff, to whom the said note and mortgage had been transferred in the settlement of the estate of John Finlayson, to release a portion of the lands mortgaged, offering to substitute other lands; that this proposition was accepted, and in lieu of the lands thus surrendered the present mortgage was substituted, being duly executed by the said John B. Lipscomb and wife; that having failed to pay the notes mentioned they were put in judgment, the mortgage made by Dickinson, Ardis, and Lipscomb was foreclosed, the lands sold, and the proceeds credited on the debt and mortgage, leaving due $1,896.83. The plaintiffs then, following the usual form of allegation and prayer, seek a foreclosure and sale of the mortgaged lands. To this bill defendant Lipscomb answers. He admits the execution and delivery of the mortgage, admits that the notes were sued to final judgment, the sale of the lands, and the application of the proceeds to the payment of the debt, the property bringing less than the debt, the complainant being the purchaser. The defendant then alleges that on the day of the sale, which defendant was unable to attend on account of the death of his wife, complainant came to defendant's house, in response to a message from defendant, and told defendant not to interfere with or put himself to any trouble on account of the sale, that he, complainant, would bid the property in and satisfy the judgment against defendant; told this defendant that the property was worth the judgment, and that he would take it and satisfy it; that in reply to an effort which had been made by some of defendant's friends to postpone the sale one or two months in order that arrangements which were in progress to make the lands bring the amount of the judgment

might be completed, complainant said there was no necessity for such arrangements, as he would take the lands in satisfaction of the claim, urging at the same time that a postponement of the sale would only induce further and greater costs, when there was no necessity for it under the arrangements between him and defendant; that at the same interview complainant promised this defendant to release the mortgage sued on in this action, and this defendant, relying on these promises of complainant, sent word to his friends who were representing his interests to let the sale proceed, telling them of the arrangements with complainant.

There was replication and proof. The proof was substantially as follows:

The plaintiff introduced the original mortgage and the proceedings in the antecedent foreclosure of the other mortgage, showing the balance due on the debt after giving credit for the amount of the bid.

John B. Lipscomb, the defendant, testified: "When the plaintiff foreclosed the mortgage on the other property witness was unable to attend the sale, his wife having died the night before the sale. Witness understood that his brother and some other friends were making arrangements to bid in the property, make it bring the amount of the debt, or to postpone the sale, and witness then sent for Dr. Hines to come to his house, and he did so. That witness and Dr. Hines talked about the sale, and Dr. Hines told the witness that the sale need not be postponed, that it would just increase cost, and that he would release the mortgage sued on in this action; that he would take the other property for the debt. Witness then sent word to his brother and friends that they need not bother any more about the sale, to let the place sell, as it was all understood between him and Dr. Hines; witness thought that the mortgage sued on in this action was released until several months afterwards. The plaintiffs bought the property

about five or six months afterwards. Dr. Hines told witness that he thought on the day of sale that he would release the mortgage sued on in this action, but things had not turned out as well as he had expected. Witness asked Hines if he did not promise to release it on that day, and he said yes, and he thought he would, but the expenses had been so heavy for costs and lawyer fees. Sometime afterwards he brought this suit."

John B. Lipscomb, Jr., a son of the defendant, testifies "that on the day when his father's place was sold that his father sent witness down for Dr. Hines. Witness saw Dr. Hines at the court-house and told him that his father wanted to see him, and he went up just behind Hines. Dr. Hines and witness' father had a conversation before the gate. Witness was in the yard. Witness heard Dr. Hines say that witness' father might sell the Mosely place at any time, that he would release the mortgage. Witness' father told witness to come down town and tell his uncle Milledge and Mr. Frank Mosely not to bother any more about that matter, as he had seen Dr. Hines and made it all right with him. Witness came down town and saw his uncle Milledge and Mr. Frank Mosely talking together, and he told them that his father said not to bother about that matter, as he had seen Dr. Hines and made it all right with him. The house mentioned as the Mosely house is the property in dispute in this action."

John B. Lipscomb, recalled, says, alluding to the foreclosure of the first mortgage: "Before the referee's report was filed I went with the referee to Dr. Hines and talked with the Doctor about purchasing the land back, but he would not state his price, or that he would not sell, saying that he did not care particularly to sell, as John Finlayson would soon be of age, and he wanted the place for him."

John H. Pope, M. D., being sworn for plaintiff, says: "that in a conversation with Dr. Hines, Dr. H. told him

that he was satisfied with the security for the debt of the firm of Dickinson, Lipscomb & Co., and would not have to interfere with the property in controversy in this action. The impression received from the conversation was, that he would not disturb Mr. Lipscomb in the possession of the property in controversy."

W. J. Hines being sworn on behalf of plaintiff testified: "I had as many as three conversations with J. B. Lipscomb, the defendant, all before the sale of the mortgaged property, in all of which I made the following proposition to Mr. Lipscomb: that if, on the day of sale, I purchased the property and could sell it at private sale upon time at an amount sufficient to cover the indebtedness of Dickinson, Lipscomb & Co. to myself and Mrs. Finlayson, as trustees of John Finlayson, that I would ignore the mortgage on the Mosely land now sued upon; that I was waiting for Mr. Lipscomb, or any of his friends, to take the property under mortgage of Dickinson, Lipscomb & Ardis, and which was sold by commissioners, upon their paying or securing the amount due to us as trustees. I was acting in this matter as trustee of John Finlayson. There was no memorandum or writing made of these conversations, or of this proposition, and there was no consideration paid for the same. It was a mere voluntary proposition on my part. There was no promise made to release the mortgage on Mosely property, except upon the conditions stated, and they have never been complied with. There has been nothing paid on the judgment against Dickinson, Lipscomb & Ardis since the amounts mentioned in the referee's report as a sale of the mortgaged property."

Upon cross-examination this witness said: "I received this mortgage as a substitute for the release of lands under another mortgage made by Mr. Lipscomb and others to myself and Mrs. Finlayson, or to myself as an executor of John Finlayson. I think the release was brought to me to sign,

and that I refused to sign it until the other parties to the original mortgage would agree to it. I do not recollect whether it was before or at the time I had the first conversation about the release. I do not recollect which paper came into my hands first. I never did tell Mr. Lipscomb that he might sell the Mosely property, that I would release it. I did not tell Mr. Lipscomb on the day of sale that I would take the property for the debt. I never told Mr. Lipscomb on the morning of the day of the sale that he need not bother himself about the sale. I was sent for in the morning of the day of the sale by Mr. L., and I went up to his gate some time before the sale came off. I do not recollect what Mr. Lipscomb first said to me on the morning of the day of sale. I do not recollect of Mr. Lipscomb saying anything to me about postponing the sale, or of his saying anything to me about his not bidding on the land, or telling his friends not to do so. I do not recollect of telling Mr. L. that I thought on the day of sale that I would take the property sold for the debt, but that I did say to Mr. Lipscomb, upon or after the day of sale, that if I could sell the property for an amount sufficient to pay his award I would release the mortgaged property. I used my utmost exertion with several parties to sell the lands, but failed."

The rest of the testimony of this witness simply states that he recollects no conversation with Mr. Lipscomb on the day of sale about the two places, or that his ward could take the land. "I was unwilling to let Mr. Lipscomb have the place which was sold under the first mortgage, because I did not believe he could make the payments."

After hearing, the Chancellor entered a decree establishing the debt and for foreclosure and sale of the mortgaged premises.

Upon the rendition of this decree, and before its enrolment, a petition for rehearing was filed. The prayer of the petitioners was granted, and a rehearing allowed. From

this order an appeal was taken. This court held, upon the appeal, that where a final decree was signed and pronounced, but not recorded and entered, and the case is sought to be reheard on new facts discovered since publication passed, the remedy is by supplemental bill in the nature of a bill of review, (15 Fla., 558,) and reversed the order allowing a rehearing.

In the record of this cause as now presented, we find a pleading which was not to be found in the original record before us on the first appeal, although it bears a file mark of the 2d of December, 1875, while the notice of appeal is dated the 28th December, 1875, and service of the cross bill was acknowledged the same day.

The purpose of this cross bill is to get affirmative relief against defendant by a decree satisfying the mortgage debt alleged to be due in this suit, the defendant alleging and repeating therein the facts set up in his answer before recited. the principal ground upon which relief is sought being the allegation that the plaintiff agreed to take the property for the whole debt, and bid it off with this distinct understanding.

At a subsequent date this bill was answered, plaintiff reserving the point that a cross bill cannot be filed after final decree.

On the 17th of April, A. D. 1876, the defendant filed a petition for leave to file a supplemental bill in the nature of a bill of review. The allegations of this petition are stated in a subsequent portion of this opinion where it is considered.

He then prayed leave to file a supplemental bill in the nature of a bill of review. Leave to file the supplemental bill was granted. The supplemental bill, after reciting previous proceedings, sets up substantially the facts alleged in the petition as to the agreement of Hines to cancel the mortgage for the debt, and that the land was worth the whole of

the debt, and would have brought the debt if the bidding had not been prevented by the act and agreement of Hines. There was also a general demurrer to the supplemental bill.

Upon these pleadings the cause was heard, the supplemental bill in the nature of a bill of review was pronounced sufficient, and leave to file the cross bill granted. From the several orders recited, including the original decree of foreclosure, appeals are taken by the several parties plaintiff and defendant.

We first examine the matter of granting leave to file a cross bill, after final decree rendered, and before it is reheard, or opened by any subsequent proceeding. A cross bill is a pleading which always necessarily precedes a final decree. It is true that after publication, and even up to the hearing, the court will permit it to be filed, where it appears that the suit as instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties; but no case can be found where a cross bill is permitted after final decree. After publication passed, in order to stay proceedings upon a cross bill, the matters stated should be sworn to by some person who knows the facts. 9 Paige, 410.

The first question which the Circuit Court, upon remanding this case, was called upon to decide was the question of leave to file a supplemental bill in the nature of a bill of review, to bring forward new testimony. What is the nature of the showing that a party asking leave to file such a bill must make? It must be borne in mind that a bill in the nature of a bill of review does not lie until after final decree pronounced. If we examine this matter with reference to the analogies of common law trials, we will see that the simple allegation of the defendant setting up discovery of new evidence since the trial would not prevail for the purpose of a new trial, if the court saw plainly from the showing made that the affidavits of disinterested parties

were apparently within the reach of the party and he failed either to produce such proof or account for its absence. There has been but one case in this State in which the subject was considered to any extent, (the case of Owens vs. Forbes' administrators, 9 Fla., 326.) That was the case of an interlocutory decree where the defendant sought a review upon the ground of evidence discovered since publication. In that case the court held that "to entitle the party to relief in such cases, the newly-discovered evidence must be relevant and material, and such as might probably have produced a different determination. The new matter must have first come to the knowledge of the party after the decree. The matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known. It must not be merely cumulative, nor merely corroborative or auxiliary to what is already in the case, but must establish a new fact of itself decisive of the merits of the cause."

In that case the failure of the person who made the search for certain records (which were deemed material) to state his acts in the matter under oath, was regarded by the court as a circumstance deserving mention. With all the strictness of the rule as there stated by Judge Forward in an opinion showing no small amount of research, he still took occasion to say that the statement of facts as there made, in the petition presented, should not be followed as a precedent, and to some extent excused the defendants from the required diligence and inquiry by the fact that they were administrators.

Judge Forward in this opinion refers with approbation to the views of Mr. Justice Story in Dexter vs. Arnold, 5 Mason, 310. It will be there observed that while there is considerable difference in the views of the courts, Mr. Story, while he does not so decide, inclines to the view that *new proof* of matter clearly in issue, if that proof is in the shape

of written evidence, may be produced as well as new facts. Speaking, however, of the testimony of new witnesses he says: "If it be admissible (upon which I am not called to decide) it ought to be received with extreme caution, and only as it is of such a nature as ought to be decisive proof." In Kentucky the evidence of new witnesses is rejected. (Harden Reports, 342.) Chancellor Kent's view, as announced in 3 John. Ch., 124, is that any new evidence must not be a mere accumulation of witnesses to the same fact, but some stringent written evidence or newly-discovered papers. The petition here alleges in general terms "that after the cause was submitted, he discovered new evidence material to his defence, which he could not by due diligence have produced at the former hearing; that the newly-discovered evidence is material to his case, John L. Miller, Hunter Pope, and others; that he expected to prove that at the former foreclosure referred to in the bill of complaint and at the sale there were bidders on the ground who would have bid the amount of the debt had they not been prevented by W. James Hines, trustee, who told them that the property was his, and that it was no use for them to bid. He also avers that the land thus sold was and is worth the amount of the debt."

So far as the value of this property is concerned that certainly was not new matter discovered since publication or decree. So far as the sale is concerned that was not new matter, nor can we upon any proper ground reach the conclusion that there was anything like reasonable diligence in this matter. The defendant knew of the sale, and by a simple examination of the foreclosure proceedings in the first suit, and certainly he must be held to this degree of diligence, he would have seen that it was bid off for less than the debt.

It is apparent from his answer to the original bill that he knew facts which should have led him to this examination and to the knowledge of all that he now alleges came to his

knowledge since decree or publication. Again, the witnesses by which this is to be established are named. No affidavit of theirs as to their knowledge is produced, and no reason is given for their non-production.

We are not prepared to say that the matter here proposed to be produced is new matter within the meaning of the authorities, but if this be conceded the record does not make a case of reasonable diligence. The defendant had months after the sale to inquire into the facts, and his mind had been directed to the inquiry as to the reason for the failure of the land to bring the debt. He says it was the agreement of the plaintiff to take the land for the debt, and inquiry to that end was the most natural thing possible for a business man of ordinary prudence and attention. Even when controlled by the rules adopted by the most liberal courts in this respect, we cannot see how we can sustain this action of the court in granting the prayer of this petition.

Mr. Justice Story, speaking of this subject, says, "*The qualification of the rule is that the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known, for if there be any laches or negligence in this respect, that destroys the title to relief.*" Story's Eq. Pl., §414.

Having disposed of the matter of the cross-bill and of the petition for leave to file a supplemental bill in the nature of a bill of review, we reach the only remaining question, and that is the final decree. From this decree defendant appeals. Had we concluded otherwise than we have upon the question of the cross-bill and petition for leave to file the supplemental bill, the matter of the final decree would not have been properly a subject of review by this court, but of rehearing by the court below. As it is, however, this question is properly presented. It is held in proceedings in the same suit that if a purchaser at a sheriff's

sale succeed by false statements or suggestions in deterring others from bidding, and they obtain the property for an inadequate price, the sale will be set aside and a re-sale ordered. 5 Ind., 487; 7 Black., 275; 25 Ill., 173.

It is held also that as a matter of public policy the law provides in various ways for a fair competition in sales made by its authority, and generally whatever prevents it is a fraud. (3 John. Cases, 29.) Acts preventing a fair competition are also held to constitute a fraud on the debtor and his remaining creditors. So if "puffers" at an auction enhance the price and deceive other bidders, and they are in fact misled, it is held that the sale will be held void as against public policy. The reason is, a fair competition is prevented. (7 Black., 267; 6 John., 194; 8 John., 144.) These rules are announced in cases arising between the parties, or those having notice of these equities.

In this case the defence as to the prior decree is presented collaterally. We have here neither a bill original in its character, nor a proceeding in the same suit in which the sale occurred asking relief. This proceeding is a collateral assault upon a prior decree and sale, made months after the sale occurred. 2 Pet., 162; Rorer on Jud. Sales, 466.

The plain and sure remedy of this party was a petition to the court after the sale to set it aside, or an original bill to accomplish the same purpose, if his proofs were sufficient to justify such action. His failure here so to do for months must, to some extent, control this court in reviewing the issues presented in the cause as heard upon the final decree. His laches, with a plain remedy, indicate a simple desire for delay in a suit asking a foreclosure of this mortgage.

The defence in this suit is that the mortgagee agreed to bid in the property and cancel the debt. We have in the statement of the case inserted the testimony at length. Between the plaintiff and defendant there is a clear, plain and direct conflict.

So far as the testimony of Dr. Pope is concerned, it is not inconsistent with the testimony of plaintiff Hines. He says that Dr. Hines said to him that he was satisfied with the security for the debt of the firm of Dickinson, Lipscomb & Co., and would not have to interfere with the property in controversy in this action. The impression received was that he would not disturb Mr. Lipscomb in the possession of the property in controversy. It is entirely probable, and there is no doubt of the fact, that this statement was made. This was Hines' opinion at the time stated; but upon what principle can a party, speaking casually of a friend's indebtedness, be held to a mere statement of what, perhaps, was his hope, that it would not be his unpleasant duty to enforce a second mortgage for the same debt, when he had two mortgages to secure it?

As to the testimony of the son of the defendant in this cause, it is both uncertain and indefinite, and does not purport to give the whole conversation had at the time and for these reasons not entirely inconsistant with that of the plaintiff Hines. This witness testifies that he heard Hines say that his father might sell the land now in controversy at any time; that he would release the mortgage; that his father told him to go and tell certain parties (his uncle and Frank Mosely) not to bother any more about the matter of bidding, as he had seen Dr. Hines and made it all right. This testimony is entirely consistent with the statement of Dr. Hines that he agreed with defendant that he would, even after a sale, give time to pay the debt and redeem the land.

Plaintiff's son simply says that he heard Dr. H. say that there would be no use for selling the second place mortgaged; and this may have been, as Dr. H. says, upon the hypothesis that defendant would pay the whole debt and thus prevent it.

Upon the testimony and record as presented, in view of the principles which must control us, this decree must be

affirmed. As against the mortgage and against a legally-established and ascertained debt, we cannot accept such testimony as sufficient to pass a decree of satisfaction.

The decree must be affirmed without prejudice to any right the defendant may have to a proceeding in the suit in which the first mortgage was foreclosed, or without prejudice to any right he may have to file an original bill to set that sale aside, or to an action for damages.

As a matter of course we do not determine that there is any such right; we only save it from the operation of this decree, if it exists. The orders in this cause granting leave to file a cross-bill and a supplemental bill in the nature of a bill of review, are reversed and set aside; the cross-bill and supplemental bill in the nature of a bill of review, are set aside; and the decree of the Circuit Court of the Third Judicial Circuit herein rendered on the 29th day of May A. D. 1875, is affirmed, without prejudice to defendant's right, if any such there be, to a proceeding in the suit in which the first mortgage was foreclosed, or to file an original bill in reference thereto, or to an action for damages for the alleged fraud in such sale.

JOHN DUNN, APPELLANT, VS. BARTON AND HAZELTON, APPELLEES.

It is the duty of an under-lessee to inform himself of the covenants contained in the original lease, for, if he enter and take possession, he will be bound to these covenants. Where the restriction upon the manner of using the premises is a covenant running with the land, it is binding upon the estate in the hands of a sub-tenant. He takes the title of the lessee with like limitations and restrictions.

Appeal from the Circuit Court for Escambia county.

The facts are stated in the opinion of the court.

C. C. Yonge for Appellant.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This bill is brought by the appellant, John Dunn, against the respondents, Barton and Hazelton.

The plaintiff alleges that Mary C. Barton leased the premises, which are mentioned in the bill and in reference to which this action arose, to Charles Evans for the term of five years from May 1, 1874; that Evans assigned the lease to W. M. Abbott, who assigned it to plaintiff Dunn on the 24th of November, 1874, in the consideration of five hundred and twenty dollars; that on the 27th day of January, 1875, the said Mary Barton, in consideration of being permitted to occupy the premises until the end of the term without additional rent, over and above what he was to pay, (the sum of forty dollars per month,) agreed that during the period of the lease she would not authorize or permit the premises to be used in any way, or for any purpose that would conflict or come in competition with the business of the said John Dunn, as then carried on in the adjacent building, which was that of a public bar-room, where liquors and wines were retailed and where refreshments were furnished, and that she shall occupy the premises until the end of the lease.

As an exhibit to the bill there is filed an agreement, executed by Mary C. Barton and John Dunn, under seal, attested by two witnesses, authorizing her to use and occupy the premises for the time named and upon the conditions stated. Upon this agreement there is no evidence of its having been recorded, nor is there in the bill any allegation to that effect.

The plaintiff then alleges that Mary C. Barton is now permitting the premises to be used for carrying on the same

business that he is engaged in, and prays an injunction restraining her from the use of the premises in the manner mentioned, and from sub-letting the same to be used for any purpose not authorized by the agreement between the parties.

The plaintiff, as against Annie Hazelton, alleges that defendant, Mary C. Barton, after having occupied the house for about one year, has "undertaken to sub-let the said premises to Annie Hazelton, who has entered upon and is now occupying said tenement without plaintiff's permission and against his objections, in the business of a public bar-room, where liquors and wines are retailed, and refreshments are furnished."

The plaintiff then alleges that defendants have no property, over legal exceptions, within reach of any judgment or execution, sufficient to cover the damages he is about to sustain and is sustaining daily.

He alleges further, that he made a lease to one William Blumer, covenanting that he (Blumer) should enjoy the same protection from competition in business as he had secured to himself in his contract with Mary C. Barton. He prays for an injunction restraining the defendants from the use of the said premises in the manner indicated; that Mary C. Barton be enjoined from sub-letting the said tenement to Annie Hazelton, or to any other person, to be used in the manner set forth, or for any other purpose conflicting with the interest of his business, or of that of his lessee, William Blumer; that said Annie Hazelton be restrained from occupying or using the said premises, in the manner and for the purposes above set forth, or without the consent of your orator, or in any manner dispossesing him of the exclusive control of the same, as provided in his said contract of January 27, 1875.

Mary C. Barton, in her answer, denies that she executed the contract of 27th January, 1875, with a knowledge of its contents; that she never read it, or had it read to her; that she was unaccustomed to business and was imposed upon

by plaintiff, and that his act was a fraud; admitting, however, that she had previously agreed to sign an agreement not to use the "tenement," nor permit it to be used, for retailing liquors by the glass in competition with his business. She denies any agreement to give him exclusive control of the premises, and affirms that there was no consideration for the contract. She admits the lease to Annie Hazelton, but denies that she authorized any conflict with plaintiff's business. She affirms that the adjoining house occupied by plaintiff's lessee, Blumer, has become a nuisance to her, by reason of the nightly noisy dancing and frequent drunken orgies of male visitors and women lodgers, and claims that, by reason of plaintiff's permitting such use of his house, he is estopped from complaining of her in a court of equity.

Defendant, Annie Hazelton, answers that while it may be true that plaintiff contracted with Mary C. Barton as alleged in his bill, for anything to the contrary she knows, yet that she is an utter stranger to all and every such matters, and cannot form any belief concerning the same; that she rented the Barton House on the 1st of February, 1876, from Mary C. Barton, at the monthly rent of $100, payable in advance, for two months of which she has paid, and that she is now engaged in keeping a restaurant and refreshment saloon upon the premises, and denies that this business is injurious or detrimental to the business of the plaintiff. To these answers there was a general replication. After these replications follow affidavits on one side affirming that Wm. Blumer kept a house of improper character, and some alleging that Annie Hazelton kept a house of the same kind.

No allusion has been made to their particular contents in argument, and we see no necessity in the disposition of this case to recite them here.

On the 22d February, 1876, after argument, a temporary injunction was granted restraining Mary C. Barton from permitting or authorizing the use of the premises for the pur-

pose of retailing wines and liquors and furnishing refreshments, or otherwise depriving plaintiff of the exclusive control of the premises, and enjoining Annie Hazelton from using the premises for such purpose.

A few days after granting this injunction, Annie Hazelton moved to amend her answer upon an affidavit to the effect that since the filing of her answer it had come to her knowledge that the lease to Dunn from Abbott of the premises known as the Barton House, whereon John Dunn founded his claim to the injunction herein issued, was not recorded in accordance with the requirements of the laws of Florida, as against third purchasers, without notice, at the time she rented the premises from Mary C. Barton; that before renting said premises from said Mary C. Barton she caused the records in the clerk's office to be examined, and thereby ascertained that the ownership of said property was in the said Mary C. Barton, and that she never had any notice, actual or constructive, that said John Dunn had leased the said premises from any one, or had any right or title to the possession of the same, until after the institution of these proceedings. Upon the affidavit she was permitted to amend her answer accordingly, to which answer replication was filed.

The plaintiff then moved to amend the prayer of his bill, asking for a receiver of the rents during the existence of the lease by Mary C. Barton to Annie Hazelton, in the event the court did not enjoin Annie Hazelton as prayed for, and that Mary C. Barton be enjoined from the collection of said rents, and that the same be paid into the hands of the receiver to abide the formal order of the court, and that Mary C. Barton be enjoined from making any further lease of the premises inconsistent with her contract. This motion, a motion to dissolve the injunction, and a motion for leave to file an affidavit in opposition to the matter set up in the answer, was heard; leave to file the affidavit was granted; the motion to amend the bill was denied, and the injunction was

dissolved as to Annie Hazelton. From these orders the plaintiff appeals. The grounds upon which their reversals are sought are—

1st. That the court erred in permitting Annie Hazelton to amend her answer in the manner stated.

2d. That the court erred in refusing leave to complainant to amend the prayer of his bill in the manner requested.

3d. That the court erred in dissolving the injunction as to Annie Hazelton.

We consider the last ground of appeal first. Mary C. Barton executes a lease for a house, in the city of Pensacola, to Evans, for five years from May 1, 1874; this lease Evans assigned to Abbott, and Abbott, on the 24th of November, 1874, assigned it to plaintiff in consideration of $520. On the 20th of January, 1875, Mary C. Barton, the original lessor, entered into an agreement with plaintiff, by which she was to occupy the premises for the balance of the term, stipulating that she would not permit the premises to be used in any way, or for any purpose, with the business the plaintiff carried on in the adjacent building, which was that of a public bar-room, where liquors and wines were retailed, and where refreshments were furnished. This agreement, executed in the presence of two witnesses, is filed as an exhibit to the bill. It was a transfer of the entire term, the rent reserved being the same as that fixed in the original lease. (30 New York, 456.) Upon it there is no evidence of its being recorded.

The plaintiff then alleges that Mary C. Barton, after having occupied the house for about one year, "has undertaken to sub-let the said premises to Annie Hazelton, who has entered upon and is now occupying the house without plaintiff's permission and against his objections, in the business of a public bar-room, where liquors and wines are retailed, and refreshments are furnished."

There are other allegations as to the insolvency of the de-

fendants, and as to another lease to William Blumer by plaintiff, which, in the view we take of the case, it is unnecessary to mention.

All the right, title and interest which any of these parties claim in the premises, is derived primarily from Mary C. Barton. The plaintiff himself claims through an assignment of her lease. She was in possession at the time of her lease to Annie Hazelton; as assignee of the term she makes a sub-lease to Annie Hazelton, general in its character, and without reference to any restriction in the agreement between plaintiff and her lessor. The rent she reserves is different in amount from that reserved in the first lease. Do these allegations make a good case against her?

Such a covenant as existed between Mrs. Barton and Dunn would run with the land, affecting, as it does, the mode of enjoyment of the premises. (10 East, 130; 1 Smith's Leading Cases, 122; 17 Wend., 136.) It would not be void as being in restraint of trade. (1 Smith's Leading Cases, 131.) Has Dunn an equity as against Mrs. Hazelton to enforce the covenants between himself and his assignee, Mrs. Barton?

Plaintiff in his bill no where alleges, as against Mrs. Hazelton, that she had notice of the covenant not to use the premises for a public bar-room, or that he recorded his deed; and Mrs. Hazelton in her answer affirms that she is an utter stranger to the covenant set up in the bill as between her lessor and Dunn, her lessee's assignor.

The covenant between Mrs. Barton and Dunn was no part of the lease assigned by Dunn to Mrs. Barton. It was a separate and distinct agreement between them outside of the terms of the lease. Now, as between Mrs. Hazelton, the under lessee, and plaintiff, there is neither privity of estate nor of contract. She has only a partial estate, the reversion being in Mrs. Barton. If Mrs. Hazelton was an assignee of Mrs. Barton, she would be personally liable to plaintiff upon

all covenants which run with the land, but she is simply an under lessee.

In some of the English cases it is held that it is the duty of a party, when contracting for an under-lease, to inform himself of the covenants contained in the original lease, for if he enter and take possession of the property he will be bound by these covenants. 3 M. & K., 283-282.

In Flight vs. Barton, 3 M. & K., 282, the court held that a party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease.

In the case of Corser vs. Collingee, the Master of the Rolls says of an under-lessee, who goes into possession under an agreement for an under-lease, "if there were no evidence whatever other than the facts I have now stated, *prima facie*, a man who agrees to take an under-lease must know that he is to be bound by all the covenants contained in the original lease."

In the case of Wheeler and another vs. Earle, 5 Cushing, 35, the Supreme Court of Massachusetts, in speaking of the effect of covenants running with the land in leasehold estate, says: "The restriction upon the manner of using the premises runs with the land and is binding upon the estate in the hands of sub-tenants. They take only the title of the lessee, and with the title, limitations and restrictions."

Applying this principle to this case, Annie Hazelton holds the estate subject to the covenants running with the land in the hands of her lessor. This covenant runs with the land; it affects the mode of enjoyment of the premises. 10 East, 130; 17 Wend., 136; 1 Smith's Leading Cases, 122.

Whether a sub-lessee is a purchaser within the meaning of the statutes regulating the recording of conveyances and protecting *bona fide* purchasers for valuable consideration without notice, we think it unnecessary to inquire. The sub-

lessee is in possession of the estate of his lessor, and he is bound by his covenants which relate to the occupation of the premises.

As to the remedy by injunction. Between vendor and purchaser, a court of equity will interfere to enforce a covenant of this character, and the same principle justifies its control of a sub-lessee. The jurisdiction is unquestionable. (4 Sand., 502; 2 Phillips, 775; High on Inj., 727.) With this view the question as to the amendment of the prayer of the bill, as well as the amendment of the answer, becomes immaterial.

The order dissolving the injunction is reversed and set aside, and the case will be remanded, with instructions to re-instate the injunction upon the motion of the plaintiff and upon his giving such bond as the court may, in its discretion, require.

JOHN J. THOMPSON, APPELLANT, VS. WILLIAM A. MAXWELL, APPELLEE.

1. A general demurrer to a bill, as for want of equity, will be overruled if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer.

2. Where, upon a foreclosure of mortgage, after decree and sale it is found that a portion of the lands described in the mortgage (a copy of which was annexed to the bill) were not properly described in the bill of foreclosure, a bill of review may be filed for the purpose of correcting the error in the bill and setting aside the decree and sale as to the land erroneously described; or setting aside the decree in *toto* if necessary, and obtaining a sale of the mortgaged lands.

3. An injunction should not be granted unless the bill contains a prayer therefor, nor should an injunction to stay proceedings at law be granted without bond and securities prescribed by statute, except in cases otherwise specially provided for by law.

4. A mortgagee cannot restrain the prosecution of a suit in ejectment (brought by a purchaser under a junior lien) against the mortgagor or his tenant.

5. A mortgage unrecorded or imperfectly recorded is valid as against creditors or subsequent purchasers with notice of the mortgage.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Thomas F. King for Appellant.

O. A. Myers and *Fred T. Myers* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is an appeal from the orders of the Circuit Court for Alachua county overruling a demurrer to complainant's bill and granting injunction without requiring the security prescribed by law. By the bill it appears that Maxwell, appellee, was the mortgagee and holder of a mortgage executed by Charles P. Crawford to secure some ten thousand dollars and interest, dated October 25, 1870, on 1,860 acres of land in Alachua county, witnessed by J. J. Thompson, appellant, and "A. J. DaCosta, D. C.," and recorded December 26, 1870, by W. K. Cessna, Clerk, by "A. J. DaCosta, D. C." There was no formal certificate of the proof or acknowledgment put upon record, other than what may be deduced from the above memorandum. On June 23, 1873, formal proof of the execution of the mortgage was made before the Clerk by DaCosta as a subscribing witness and duly recorded.

In March, 1873, Thompson, obtained a judgment in the County Court of Alachua county for $119.11 against Crawford, the mortgagor, and levied the same on the lands described in the mortgage, which lands were sold by the sheriff June 2, 1873, to Thompson, the plaintiff in the execution, for ten dollars, the sheriff's deed being duly recorded July 12, 1873.

Thompson brought suit in ejectment against one Dupuis, the tenant in possession under Crawford the mortgagor, and on March 31, 1875, recovered a judgment in said action for the possession of the premises and for about $600 mesne profits. The time of the commencement of the ejectment suit is not stated in the bill.

Complainant filed his bill to foreclose his said mortgage August 30, 1873; obtained his decree November 4th, and the lands were sold to complainant January 5, 1874, and conveyed to him by sheriff's deed, recorded February 25, 1874.

The bill shows that the mortgage was deposited with the clerk for record and actually spread upon the records December 26, 1870; but alleges that the clerk by mistake endorsed upon the mortgage that it was recorded in December, 1871, instead of 1870.

It is also shown that one parcel of the land mortgaged, to wit: the "W½ of section 1, T. 8 S., R. 18 E.," was erroneously and by mistake described in the bill of foreclosure, and all subsequent proceedings, including the sheriff's deed, as the "N½ of section 1," &c. It is further alleged that complainant has not parted with the title of any of said lands so acquired under the foreclosure sale. The bill prays that the clerical error of the clerk in his endorsement of the date of recording the mortgage be reformed and corrected; that the error in the description of the lands as set out in his bill of foreclosure be corrected by amending the bill and other proceedings in accordance with the truth of the description, and that such proceedings may be had therein as may be proper to rectify the said decree and proceedings; and it being alleged in the bill in this cause that the defendant Thompson caused the levy to be made upon the mortgaged lands, and a sale and deed to be executed under his judgment for the purpose of overreaching and defrauding complainant; that the sheriff's deed to Thompson casts a cloud

upon the complainant's title; that Thompson is not a *bona fide* creditor or purchaser without notice of complainant's mortgage, but that said Thompson had notice and was a subscribing witness of said mortgage; that Thompson's "purchase was inequitable, unfair, for an inadequate price, and was manifestly secured by fraudulent collusion with other parties, or by the gross ignorance of the sheriff;" that no public notice of said execution sale was given as required by law; that the said sheriff's deed conveys no interest to Thompson as against the mortgage title; that the judgment in the ejectment suit against Dupuis for rents and profits, and for possession, was obtained more than thirteen months after complainant's purchase at the foreclosure sale, was contrary to equity and fraudulent, and yet he persists in claiming title and in taking possession of the lands; complainant thereupon further prays that the levy and sale under Thompson's execution be set aside and the deed annulled so far as the same covers the land embraced in the mortgage; that Thompson be enjoined from further proceeding with the judgment in ejectment or writ of possession under it, and from taking possession, or collecting the rents and profits of the premises, or the judgment recovered therefor, and that the sheriff deliver the quiet possession to complainant. Afterward the complainant amended his bill "by alleging that said defendant is now seeking by suit against J. D. Matheson, one of the sureties with Maxwell on a bond of J. Samuel Dupuis, to pay said debt in ejectment, which the complainant avers to be void as before stated in said bill, and complainant says that a judgment on said bond against said co-surety will be a judgment against complainant under the statute for contribution, whereas the complainant avers that the obligors on said bond are not bound thereby by reason of the facts set forth in said bill without *securing* (sic) the principal before there

been a breach of said bond so far as complainant
ws."

The defendant Thompson demurred on the general
nd that "there is no equity in the bill."

pon hearing the demurrer was overruled and defendant
mpson enjoined, as prayed, from proceeding with a suit
hompson vs. Matheson "upon the appeal bond of J. S.
is, principal, and W. A. Maxwell and J. D. Matheson,
the further order of the court, provided the complain-
ile his bond as usual in such cases with his own signa-
alone, without surety, within twenty days, for the sum
fteen hundred dollars." Thompson was further en-
d from further proceeding to enforce or execute any
of possession issued, or to be issued upon the judgment
ectment until further ordered. No security was re-
d upon the latter injunction. From these orders
mpson appealed, and seeks to reverse the same—1st,
se the court erred in overruling the demurrer, and 2d,
se the court granted the injunctions without requiring
mplainant to give the bonds and securities prescribed
v.

t is a well settled rule that upon a general demurrer
ill, if there is in the bill any good ground for equita-
ief, the demurrer must be overruled, even if there are
umber of grounds of special demurrer in the bill.
s Eq. Pl., §443; Cooper's Eq.Pl., 112; Barb. Ch. Pr.,
nd citations.

bill, as a bill of review, filed for the purpose of cor-
the apparent errors in the decree and in the record
foreclosure proceedings in the suit of this complain-
inst Crawford (which errors affect the vitality of the
o a certain extent, and proceeding from an evident mis-
d misadvertance in the description of the mortgaged
y,) presents a case which entitles the complainant to
le relief.

A bill of review lies after a final decree, (Story's Eq. P. 408, *a;* 2 Barb. Ch. Pr., 93; Whiting, et al., vs Bank U. S 13 Pet., 6; Putnam vs. Lewis, 1 Fla., 455;) and may be filed without leave of the court. 2 Dan. Ch. Pl. & Pr. Am. Ed. 1633; 17 Ves., 178.

The bill may pray simply that the decree may be reviewed and reversed in the part complained of, if it has been carried into execution. If it has been executed the bill may also pray the further decree of the court to put the party complaining of the former decree into the situation which he would have been if the decree had not been executed; (2 Dan. Ch. Pl. & Pr., 1632-3; Story's Eq. §420;) and a supplemental bill may be added, if any thing has happened which requires it, and particularly if a person not a party to the original suit becomes interested in the subject, he may be made a party to the bill by way of supplement. 2 Dan. Ch., *sup.;* Price vs. Keyte, 1 Ves. 135; Whiting vs. Bank, 13 Peters, 6.

In Millspaugh vs. McBride, (7 Paige, 509,) it was held by the Chancellor that where the complainant in a foreclosure had become the purchaser and had not parted with the interest, the decree might be opened by the court which pronounced it, where the error cannot be corrected by rehearing or upon a bill of review.

A bill of review is in the nature of a writ of error. Its object is to procure an examination and alteration or reversal of a decree upon a former bill, which decree has been signed and enrolled. Story's Eq. Pl., §403, *et seq.*

The error in the decree complained of consists in the recital, by mistake, in the bill and subsequent proceedings including the final decree and deed, of the description of portion of the lands included in the mortgage, the latter erroneously describing the lands as the "N½" of a section, when as the mortgage described the land as the "W½" as is contained in the deed. This error may

ected by a bill of review which will set the parties right. The mortgagor should be duly summoned, if not appearing o answer the bill, and upon a decree correcting the error in ne bill of foreclosure, and in the decree of sale (vacating so uch of the decree and the deed as relates to the erroneous escription (there should be an order of sale of so much of the roperty as may be effected by the mistake, unless the mort- age is otherwise satisfied, or unless a defence against the facts t out in this bill be established according to the law and uity of the case. As there is equity in the bill, the de- urrer was properly overruled.

It was proper to make the defendant Thompson a party the suit, because he had, after the execution of the mort- ge, become an incumbrancer and purchaser and had the eriff's deed covering a portion of the mortgage lands, and would not have been amiss if he had been made a party the foreclosure suit in the first instance, as in that case question of priority of lien could have been tried and de- mined.

I. The remaining ground, upon which the court is alleged have erred, is that the injunctions were granted without cting security as required by statute. The act of 1828, omp. Dig., 454,) as amended by Chap. 526, laws of 1872, vides that no injunction to stay proceedings at law after lict shall issue, unless the party applying shall previously the costs and enter into bond with two or more sure- to pay the amount of the judgment.

he act of 1861, Chap. 1098, authorizes the court to allow njunction without security where the party shows that s unable to give bond, and proves to the judge that the nds of his action and the facts warranting an injunction rue as alleged in the bill. These statutes were not ob- d, but the injunction staying proceedings on the re- y in the ejectment suit was granted without sureties. n addition to this fact, it does not appear that the com-

plainant, by his bill, prayed an injunction to restrain suit upon the bond of Dupuis, Matheson and complainant Maxwell, which is mentioned in the amendment of the bill. The statute is explicit that no injunction shall be granted in such case, unless the restraint is prayed for in the bill. (See also Story's Eq. Pl., §41.) The writs of injunction having been so granted, the one without the prayer and both without security, were granted improvidently. But this matter should be disposed of on other grounds apparent from this record.

The matter alleged as the ground of injunction to stay the action against Matheson on a bond, is not so clearly or sufficiently stated as to enable the court to see that it has any connection with the subject-matter of this suit.

We have quoted in the statement of the case the entire allegation of the bill as amended in respect to the ground of the injunction, from which it appears that Thompson has commenced a suit against Matheson upon a bond executed by him, with Maxwell, complainant, as sureties for Dupuis, to pay the damages recovered in the ejectment suit against Dupuis. But there is no good reason shown why the bond should not be prosecuted. No case is made by the complainant which entitles him to relief by injunction against the proceeding on the bond, if we understand the complainant's bill. Again, it appears from the bill (as we understand it) that complainant held a mortgage upon Crawford's land for ten thousand five hundred dollars, executed in December, 1870, which fact was known to Thompson, and, indeed, the mortgage was executed in his presence and attested by him. Subsequently Thompson sued Crawford and recovered judgment for $119 and sold the mortgaged land, and afterwards, upon the title derived from this sale, brought ejectment against Dupuis and recovered the lands and rents and profits. Thompson had an undoubted right, upon the facts stated, to sell Crawford's interest in the land, and as pur-

chaser, to recover possession from Crawford or his tenant and to recover mesne profits, for his title was good as against them. The mortgage raised no obstacle to the recovery. Thompson purchased in June, 1873. In August, 1873, complainant commenced the foreclosure of his mortgage, and in January, 1874, purchased the land on the foreclosure sale, and on the 25th February, 1874, procured his deed. Until this purchase he had no title, and was not in a condition to resist a suit for possession by Thompson. When this complainant seeks to recover possession upon his foreclosure deed, it is not probable that Thompson, as a *creditor and purchaser, with notice of the interior mortgage,* will be able to defeat the complainant's title, according to the case stated in this bill. (Thomp. Dig., p. 180, Sec. 4.) Thompson's title upon a sheriff's sale on execution upon judgment junior to the mortgage, (of which he had notice, even though it may not have been properly recorded,) was probably a good title as against everybody, except a purchaser under the mortgage. Whether there was any collusion or fraud in the method of procuring his deed under his execution and judgment by Thompson, as is intimated in the bill, may be inquired of at the proper time, with proper parties before the court. The fact that this large quantity of land was bid in by Thompson under the execution sale for ten dollars, is not evidence of fraud on his part. He doubtless bid with reference to the mortgage and its possible consequences. There appears to be no ground for an injunction upon the facts charged in this bill.

Whether the execution of the mortgage in the presence of the recording officer, as one of the subscribing witnesses, is a sufficient authentication or proof of its execution before such officer to entitle the mortgage to record, it is not necessary now to examine.

The decree of the court overruling the demurrer is af-

firmed, and the orders allowing the several injunctions are reversed with costs.

WILSON'S ADMINISTRATOR, ET AL., APPELLANTS, VS. CALVIN B. DIBBLE, APPELLEE.

1. A sheriff does not become an administrator *ex-officio* of an intestate estate until empowered by the probate court to act as such, and until that event he can do not act, or consent to nothing, to bind the estate.
2. A service of subpœna upon a sheriff, as *ex-officio* administrator, before he has been ordered by the Judge of Probate to take charge of the estate of a deceased mortgagor, does not authorize a decree *pro confesso*.
3. Where there is a total absence of parties against whom a decree can be made, a plea in abatement should be sustained.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

E. C. F. Sanchez and *B. H. Thrasher* for Appellants.

J. H. Goss for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is a bill to foreclose a mortgage executed by Lemuel Wilson to Calvin B. Dibble. The bill was filed in Alachua Circuit Court February 17, 1875, against "Louis A. Barnes, sheriff, *ex-officio* administrator of the estate of Lemuel Wilson, deceased." There is no allegation in the bill that Lemuel Wilson is dead, or that Louis A. Barnes was his administrator, except as thus recited in the entitling of the bill in the foregoing words.

April 2, 1877, a decree *pro confesso* was entered by com-

plainant. December 22, 1877, an order was made substituting Samuel C. Tucker, sheriff, as administrator *ex-officio* of Wilson, deceased, in place of Barnes, discharged. December 28, 1877, a final decree was entered, directing a sale of the mortgaged premises, and, subsequently, B. F. Dawkins was appointed a special master to sell. At this stage of the cause, Samuel C. Tucker, as *ex-officio* administrator of the estate of Lemuel Wilson, deceased, together with Raphela S. Wilson, Mary E. Shuford, James L. Shuford, A. J. DaCosta, Amanda DaCosta and William A. Wilson, (infant, by his next friend,) filed their bill in equity against Calvin B. Dibble and B. F. Dawkins, special master, wherein they pray an injunction against Dibble and Dawkins, restraining them from selling the lands under said decree on account of sundry alleged fraudulent transactions of the said Dibble, calculated to injure said complainants, who, except said Tucker, are heirs-at-law or legatees of said Lemuel Wilson, alleging that said mortgage is fraudulent; and further alleging that in the suit of Calvin B. Dibble to foreclose his mortgage, Louis A. Barnes was not an administrator *ex-officio* of the estate of Lemuel Wilson, deceased; that no subpœna was ever served on Barnes as such administrator; that all the proceedings in that case were altogether irregular, insufficient and void.

The matters alleged in the said bill came on to be heard before the Circuit Judge February 6, 1878, who considered, among other things, that the proof of service of subpœna in the suit of Dibble against Barnes, as administrator, was "not satisfactory," and ordered that the decree *pro confesso* and the final decree therein be declared null and void and set aside, and that the proceedings on the bill of foreclosure be stayed until the further order of the court; and ordered further, that all the complainants be required to plead, answer or demur to the bill of Calvin B. Dibble against Samuel C. Tucker, sheriff and *ex-officio* administrator of Lemuel

Wilson, deceased, (successor to Louis A. Barnes, removed by the first rule day in March next. Whereupon all of said complainants filed their plea in abatement in the foreclosure suit, praying judgment that said bill of Calvin B. Dibble be quashed, &c., because the said Barnes was not the administrator of the estate of Wilson, *ex-officio* or otherwise, at the time of filing said bill on the 17th February, 1875, and was not appointed, and did not become such administrator until the 24th day of April, 1875, nor was the said Samuel C. Tucker such administrator until long afterward.

The affidavit of L. A. Barnes, dated December 28, 1877, states that he remembers that a subpœna in chancery was presented to him in the cause and that he acknowledged due service thereon, but the time of such service is not stated.

Another affidavit of L. A. Barnes, dated February 1, 1878, states that he thinks he was served with a subpœna in the foreclosure case but is not certain of it, and that he gave no notice of the service on him to the widow or any of the heirs of Lemuel Wilson, or that such a suit was pending against the estate.

The court ordered that the plea in abatement be overruled and set aside, and the said Tucker, *ex-officio* administrator, and the other parties who had filed their plea under the order of the court as stated, appealed from the order overruling their plea.

This court, in the case of Davis vs. Shuler, (14 Fla., 438,) held that under the statutes of this State (Th. Dig., 1989, and Section 3, Chap. 157, approved January 7, 1848,) a sheriff was not an administrator *ex-officio* until ordered and empowered by the proper court to act as such, that he could perform no act, and was under no responsibility as administrator until he was so empowered, and a judgment recovered against a sheriff as administrator *ex-officio* obtained by service of process upon the sheriff before he was so appointed was void. The sheriff, by admitting service, or submitting

to service of process, cannot bind the estate, because, in law and fact, he is not an administrator until duly authorized as provided by law.

In the present case, Barnes, sheriff, at the time of filing this bill of foreclosure, was not the administrator of the estate of Wilson. He was some months afterward, as appears by the plea and by the order of the probate court found in the record, duly commissioned to act as such administrator.

The bill of foreclosure named no other persons as defendants. There was no proof of service upon Barnes, except his affidavit under date of December 28, 1877, stating that he remembered that a subpœna had been presented to him in the case, but *when* this was done is not apparent, whether before or after the letters of administration were granted to him. It is evident, then, that when the bill was filed in this cause Barnes was not the legal representative of Lemuel Wilson, deceased; that there is no evidence in the record that there was any proper service of a subpœna at any time; that there is not in the complaint any allegation or averment that Barnes or any other person was the administrator, and the bill was filed without a real party defendant. Neither since the appointment of an administrator has there been any service of a subpœna, nor does the bill allege that an administrator has been appointed upon whom process may be served. The parties who filed this plea in abatement have only obeyed the order of the court, and they have pleaded properly that there is a total defect of parties defendant, so that the suit had no vitality, and the plea should have been sustained. Story's Eq. Pl., §§75-6 *a*.

As to who should be parties in suits for foreclosure of mortgages, we refer to Story's Equity Pleadings, Sections 72 to 76, 193 to 200, 5th edition.

A portion, if not all of the pleadings are proceedings in the suit of S. C. Tucker, administrator, and others, against Calvin B. Dibble and B. F. Dawkins, before referred to, are

incorporated in the record of this cause, and an appeal therein appears to have been taken from the order requiring the complainants to plead in this cause. The record now certified to us, however, is that of the foreclosure case only, and although the counsel considered in their argument the appeal referred to, we will not examine it until the record in that case is brought here. It relates to a suit standing as a bill of review or otherwise, independent of the case before the court. As to the order therein requiring the complainants to plead or answer the bill of foreclosure, it does not make them parties defendant in this suit, nor have they been made defendants therein by any proper process.

The order of the court overruling the plea in abatement is reversed.

ENDEL & SON, APPELLANTS, VS. JOSIAH T. WALLS, APPELLEE.

1. Where parties holding a deed executed for the purpose of securing them for money due and advances to be made, and they on delivery of the deed gave to the grantor an agreement to convey to the grantor, on payment of a sum named, the interest of the grantees is a mortgage interest; and if they have taken possession of the premises against the consent of the grantor, and without foreclosure, his proper remedy against them is at law, and not in equity, to recover the possession.

2. The fact that complainant's property was taken possession of by a mortgagee without foreclosure, while complainant was in custody of a committee as an adjudged lunatic, does not give him, after the restoration of his reason, a right to recover possession of his land by bill in chancery.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

J. H. Goss for Appellants.

E. C. F. Sanchez and *B. H. Thrasher* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for Alachua county allowing an injunction.

The bill was filed by Walls against M. Endel and his son, and alleges that in July, 1876, Endel & Son offered to furnish supplies to Walls for his plantation to the amount of twelve hundred and fifty dollars, provided Walls would secure the amount by giving them a deed of his house and lot in Gainesville, and that they would give him a writing binding them to reconvey on his paying them the amount, and being in need of credit he accepted the proposition, and he and his wife executed and delivered to the Endels a deed of conveyance of his said house and lot, and the Endels executed and delivered to Walls a writing under seal, whereby they covenanted and agreed that upon the payment by the said Walls by the first day of December, 1877, of twelve hundred dollars, the said Endel & Son would sell and convey to Walls the same property by good and valid deed, but if Walls should fail or refuse to pay said twelve hundred dollars at the time stated, then said agreement to be of no effect. These papers were duly proved for record and recorded on the same day.

Walls obtained goods and advances from the Endels under the arrangement.

In January, 1878, Walls was declared a lunatic by the Circuit Judge, and was confined in the lunatic asylum for about a month, when on his recovery he returned and found that the house and lot which he had left in the possession of

his family had been wrongfully taken possession of by the Endels, by operating upon the fears and timidity of Mrs. Walls and threatening her in various ways, without authority or process of law, and without having foreclosed his mortgaged lien, and without the consent of his trustee, who had been appointed during his lunacy, and said Endels had rented said property to a tenant who was in possession and withhold the same from the complainant.

The bill further charges that Endell & Son have not paid and advanced him the sum of twelve hundred and fifty dollars, but only a part of that sum over and above his account against them for cotton and other crops, &c.; and further charges that the Endels have a mortgage interest in the property, and had no right to the possession by virtue thereof.

The bill thereupon prays an injunction to be issued, enjoining and restraining the said Endel & Son from selling or disposing of said property, or encumbering it in any way, and further prays a "writ of restitution by which the said Endels will be displaced of their ill-gotten possession of said property, and your orator placed back in possession thereof, just as he was before the Endels ruthlessly invaded his rights, and that they be compelled to disgorge the rents collected, if any," and "for such other and further relief as is usual and customary in equity in matters of this kind," and finally "that by some proper process from the hands of this honorable court the Endels be put out of said premises and all who hold under them, that your orator may be re-instated in his rights as to said property."

Upon reading the bill and exhibits the judge granted an injunction that "M. Endel & Son, their agents and attorneys, be enjoined and restrained by this order from claiming and exercising any right of possession in the premises above described, or renting or collecting rents therefrom, until the further order of this court," March 8, 1878. From this and

from an order subsequently made, refusing to dissolve the injunction, defendants appealed.

The complainant has mistaken his remedy in this case. The charge that the defendants forcibly, or by improper means and influences operating upon the timidity of his wife, obtained an unlawful possession of his property, upon which they hold a mortgage, does not show that he has grounds of equitable relief; but on the contrary that he has a plain and adequate remedy at law, either under the forcible entry and detainer act, or by his action of ejectment.

According to the allegations of the bill, the defendants have a mortgage upon the property in question for twelve hundred dollars or less, and they have taken unlawful possession, and are unlawfully withholding the same from the complainant.

The material prayer of the bill is, that the defendants be put out of possession and that the property be restored to the complainant, and for proper process to that end; in other words, the judgment prayed is a judgment in ejectment, and it is not charged that irreparable damage or mischief will ensue if the party is not enjoined. Burns vs. Sanderson and Burns, 13 Fla., 381; Freeman vs. Timanus, 12 Fla., 393.

Appellee insists that an injunction may be granted where defendants possession is but an interruption of the prior lawful possession of the complainant. The authorities cited do not sustain this naked proposition.

The case of Conway, *ex parte*, 4 Ark., 302, was that of a trustee protecting the trust property, the assets of a corporation, and forms an exception to the general rule. That case is cited in High on Injunctions, which gives several authorities referring to the recovery and protection of trust property and the like, but they are followed by this language, section 262: "Wherever, therefore, sufficient redress can be had in the courts of law, parties will be left to pur-

sue their remedy in a legal, rather than an equitable, tribunal." (Schlecht's Appeal, Pa. St., 172; Pfettz vs. Pfettz, 14 Md., 376.) The latter case held that the case presented by the bill was proper for redress at law, where the remedy is ample and complete, either by action of trespass, ejectment, or under the statutes for a forcible entry, and in such a case a court of equity cannot rightfully interfere. In that case, like the case made by this bill, the defendants had wrongfully entered, and an injunction and receiver of rents and profits *pendente lite* were refused. But it is not necessary to fortify a principle so well established.

The incident that at the time the defendants took possession of this property the complainant was temporarily a lunatic, and that a committee or guardian might have the aid of the court in protecting the property, has no effect here. It may be, as has been held in New York and elsewhere, that the court appointing the committee would punish, as for a contempt, any one intermeddling with property under the custody of its officer, for it appears in this case that the complainant, in the full possession of his faculties, is seeking to enforce legal rights against a trespasser or interloper. We have been referred to no case where, the wrong having been committed during a period of lunacy to the property of the owner, gives the restored party a standing that he would not have had if his misfortune had not occurred. He is asserting his right of redress before the wrong tribunal.

The orders appealed from are reversed, and the bill should be dismissed.

SAMUEL Z. GONZALES, COLLECTOR OF REVENUE, APPELLANT, vs. DANIEL F. SULLIVAN, APPELLEE.

1. The Constitution, operative in this State in 1855, made it the duty of the Legislature to designate objects of improvement which shall constitute a State system. The Legislature in that year (January 6, 1855,) designated certain improvements as proper objects to be aided from a trust fund created by it and thus establish a system. The primary purpose of this legislation was the construction of the works belonging to the system, not the extension of aid or bounty to the corporations having the right to construct the works so designated. The aid extended by the act was the consideration to the companies, having or to have the right to construct the works, to accept the provisions of the law, thus bringing themselves within the system, subject to its control and regulations. The designation of a road "as a proper improvement to be aided from the fund" created by the act made it an improvement belonging to the system, and the acceptance of the provisions of the law by the company having the right to construct it gave the company the rights granted. Each road was, under the terms of the law, exempt from taxation during its construction and for thirty-five years from its completion. This exemption, rested in contract, was attached to the property and could not be subsequently divested by the State.

2. During the year 1855 the Legislature designated another line of railroad as a proper improvement to be aided from the Internal Improvement Fund in the manner provided for in the act establishing the system. This constituted the road a part of the system, and upon the company's acceptance of the provisions of the internal improvement act, the right of exemption from taxation attached to the road. These acts, relating to the same subject-matter, must be construed together as one act.

3. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The internal improvement act is not organic law. It was subject to modification by a subsequent Legislature, whenever its power was not thus limited.

4. A prior Legislature cannot make the exercise of constitutional power and duty by a subsequent one depend upon the amount of gain which individuals may realize from private investments.

5. The owner of the equity of redemption and five-sixths of a mortgage debt, has an equity to enjoin the sale of land in which he has these interests when it is advertised for sale for a tax to which it is not subject.

Appeal from the Circuit Court for Leon county.

The case was transferred from Escambia county on account of the disqualification of the Judge of the First Circuit to hear it.

The material allegations of the bill are: That appellant, as collector of revenue for Escambia county, levied upon and advertised for sale on the sixth day of August, 1877, for State and county taxes for the year A. D. 1876, amounting to $4,826.84, the track of the railroad situated in said county known as the Pensacola and Louisville Railroad, with the locomotives, passenger, freight, and other cars, and machine shop belonging thereto; that said P. L. R. R. is the railroad formerly known as the Alabama & Florida R. R., and was constructed by said A. & F. R. R. Co., a corporation chartered by an act of the General Assembly of Florida, approved January 8th, 1853, (Chapter 483 of Laws of Florida;) that said A. & F. R. R. with all and singular its stations, depots, buildings, engines, houses, road-bed, superstructure, track, and other improvements and constructions thereon made, and all the rights, privileges, easements, and franchises of said A. & F. R. R. Co., were sold under a decree of foreclosure and sale rendered by the Circuit Court May 31st, 1872, and purchased by the P. & L. Company, a corporation chartered by an act of the General Assembly of Florida, approved February 4th, 1872, (Chapter 1915, Laws of Florida;) that by 18th section of the internal improvement act, (Chapter 610, Laws of Florida,) it was provided: "That the capital stock of any railroad company accepting the provisions of the act shall be forever exempt from taxation, and the roads, their fixtures and appurtenances, including work-shops, warehouses, vehicles, and property of every

description needed for the purpose of freight and passengers, or for the repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction, and for the period of thirty-five years from their completion;" that by the fourth section of an act of General Assembly of Florida, approved 14th of December, 1855, (being Chapter 734 of Laws of Florida) it was provided: "That a line of railroad to be constructed from the city of Pensacola, or any other point or points on the waters of Pensacola or St. Andrews bay, to the north line of the State, leading in the direction of Montgomery, Alabama, shall be considered as proper improvements to be aided from the Internal Improvement Fund in the manner provided by said internal improvement act;" that the said A. & F. R. R. Company availed itself of the benefit of said 4th section of said act,approved December 14th, 1855, by constructing and completing on or about July 1st, 1860, the line of railway therein provided for, to wit: from the City of Pensacola to the north line of the State in the direction of Montgomery, Alabama, and by doing all other things to entitle it to all the benefits of said 18th section of the internal improvement act, and on the 12th day of March, 1856, the said Alabama & Florida R. R. Company notified the Board of Internal Improvement of its acceptance of the terms of the internal improvement act, and of the provisions of the said act approved December 15th, 1855; that by an act approved January 15th, 1859, entitled "An act granting to the Alabama & Florida Railroad Company alternate sections of the swamp and overflowed lands," (being Chapter 885,Laws of Florida,) as well as by the action of the Board of Internal Improvement in setting apart to said railroad, in pursuance of said act, its quota of said lands, the said Alabama & Florida Railroad was recognized and adopted as one of the roads entitled to all the benefits of the internal improvement acts; that the said P. & L. R. R. and the other property levied upon and

advertised for sale as aforesaid by respondent are exempt from taxation in this State until the year A. D. 1895, and said sale would manifestly cloud the title of said railroad and other property.

Injunction against selling is then prayed and general relief and subpœna.

On 3d day of August, Judge White,of the Second Circuit, granted a preliminary injunction.

The appellant Gonzales filed a general demurrer to the bill on the 28th day of September, A. D. 1870.

On December 22d, 1877, Judge White made an interlocutory decree overruling the demurrer and gave leave to answer.

Gonzales appealed from this decree.

The Attorney-General for the Appellant.

I. There is no provision in any of the statutes mentioned in the appellee's bill of complaint, or any other statute of Florida, which granted expressly or impliedly any immunity from taxation to the property involved in this case, as the property of the Alabama & Florida Railroad Company, nor any such immunity to the Alabama & Florida Railroad Company as a company.

A careful review of the act incorporating that company, approved January 5, 1853, (Chapter 483,) will show that there is not one line or word in it pretending or professing to grant to said company, or any of the property, any such immunity, either absolute or conditional, from taxation. The subject of taxation is not a feature of the act, and it is unnecessary to consider this act further.

The act approved December 14th, 1855, (being Chapter 734,) in its fourth section provides: "That a line of railroad to be constructed from the city of Pensacola, or any other point or points on the waters of the Pensacola bay or the

waters of the St. Andrews bay, to the north line of the State, leading in the direction of Montgomery, Alabama, shall be considered as proper improvements to be aided from the Internal Improvement Fund in the manner provided for, or (that) may hereafter be provided for in 'An act to provide for and encourage a liberal system of internal improvement in this State,'" approved January 6th, 1855.

The line from Pensacola to the Alabama line contemplated by this act being the line constructed by the Alabama & Florida R. R. Company, and that company having, as is admitted by the demurrer, given the Board of Trustees of the Internal Improvement Fund of Florida the notification of March 12th, A. D. 1856, stated in the bill of complaint, we are to inquire:

1st. Whether the fourth section of the above act of December 14th, 1855, contemplated or intended an extension to the Alabama & Florida R. R., or to any railroad that might cover the line designated by it, of any immunity from taxation embraced within the provisions of the internal improvement law, even assuming that the internal improvement law provided such immunity might be extended to a railroad covering the line designated by the act of December 14th, 1855.

2d. Does the internal improvement act provide or contemplate immunity from taxation to the line of railroad designated by the act of December 14, 1855?

In considering the first of the two propositions just submitted, we invite the attention of the court to the language of the fourth section of the act of December 14, 1855. It is, "that a line of railroad," &c., "shall be considered as proper improvements to be aided from the Internal Improvement Fund, in the manner provided for, or may hereafter be provided for, in 'An act to provide for and encourage a liberal system of internal improvements in this State,'"

approved January 6, 1855. "To be aided from the Internal Improvement Fund" is the language. The language is not, "to be aided as specified in the internal improvement law," nor is it a grant of the same aid, rights or immunities and privileges granted to any railroad or railroad company by the provisions of the internal improvement law, or any such language as covers all the benefits included or embraced in said law. It is merely a declaration that the line of railroad shall be considered as a proper improvement to be aided from the Internal Improvement Fund in the manner prescribed by said act, and it indicates aid from no other source than the fund, and from it only in the manner then provided for in said act, or that might thereafter be provided for. It being then the fact that it was only such aid as could come from the Internal Improvement Fund that was contemplated by the said fourth section of the act of December 14, the question that suggests itself is whether or not any such aid as immunity from taxation could emanate from the Internal Improvement Fund or the Trustees of the same? For an answer to this question we must look to the internal improvement law. From it we find that the Internal Improvement Fund consists of the internal improvement and swamp and overflowed lands granted to Florida by the acts of Congress of March 3, 1845, and September 28, 1850, with the proceeds of sales of the same and the investments made of such proceeds. Secs. 1 and 2, Chap. 610, Laws of Florida.

The Board of Trustees of the Internal Improvement Fund, in whom this Fund is vested, is a creature of statute law, and for its powers and duties in so far at least, as any question involved in this case is concerned, and for the purposes to which the fund can be applied, and as to the benefits or immunities that can emanate or be lawfully derived from the board or the fund, we must look to the internal improvement law. (Chap. 610.) So far as any railroad or

railroad company is concerned, there are but two classes of benefits or aid to which it was ever provided by the internal improvement law that the fund could or should be applied. These are as follows:

1st. The guarantee of the interest on the bonds issued by such railroad companies accepting the provisions of the act as had a portion of the route, as authorized by their charters, lying within the line of railroads prescribed by section 4 of the internal improvement law. Secs. 2, 3, 4 and 5.

2d. The grant of alternate sections for six miles on each side of the lines of railroad indicated by section four, and the right of way, (Secs. 15 and 28,) and of alternate sections of swamp and overflowed lands by the General Assembly under section 29.

These grants, except those to be made by the Legislature under section 29, are clearly confined to railroads lying within the lines of railway designated by said act, and, in so far as said act is concerned, extend to no other line; and it is sufficient to state that a railroad from any point on the Pensacola or St. Andrews bay to the north boundary of the State is not within this line.

The above two classes of grants being then the only kinds of aid which could emanate from the Internal Improvement Fund, it is clear that they alone could have been contemplated by the Legislature when it enacted the fourth section of the act approved December 14, 1855. Chapter 734.

It is hardly to be presumed that the Legislature did not, within so short a period after the passage of the internal improvement act, understand what its exemption provisions were, or that such measu red words as those in said "fourth section" of Chapter 734, which we have particularly called to the attention of the court, were used without a full understanding that they did not include any exemption from taxation, and could not be construed to.

They certainly, taking them in their natural import and the light of the provisions of the internal improvement law, do not involve any aid or benefit which was not to emanate from the Internal Improvement Fund, and we feel justified in assuming, even without invoking at this point any of the well-known rules of construction upon the subject of exemption from taxation, that the court will agree with us that even if the provisions of the internal improvement law were broad enough to have permitted such an exemption to be extended to a railroad covering the line designated in said act of December 14, 1855, that the Legislature did not intend by said act to bring it within the favored pale of such immunity.

In considering the second of the two propositions or questions above, we respectfully submit that the internal improvement law does not contemplate immunity from taxation to any lines of railroad other than those designated by the fourth section of that law. The Alabama and Florida Railroad's line is not within either of such lines.

The appellee contends that under section 18 of the internal improvement act the said A. & F. R. R. is exempt for the period of thirty-five years from its completion.

In the case of the Atlantic & Gulf R. R. Company vs. Allen, 15 Fla., 661, this court decided that the term "roads" in said 18 section refers to the line of roads designated in the internal improvement act. Its language is: "The term 'roads' in this section refers strictly to the lines of road for the construction of which the Internal Improvement Fund was created." "To extend the exemption to other roads would be clearly inconsistent with the general purpose of the act." * * * It is unnecessary, after the decision of this court in the case of Holland vs. The State of Florida, 15 Fla., 455, to argue as to what that line was, or that the A. & F. Railroad's line was not a part of it.

The court having thus passed upon the meaning of the

term "roads" in said section, and by its decision having barred the way to this immunity against the said A. & F. R. R., it can alone contend for any immunity upon the ground of the first clause of said section exempting capital stock. But any such claim is equally groundless. It is the capital stock of such companies only as could legally accept the provisions of the act. For the correct meaning of the terms "company accepting the provisions of this act," we must examine the statute and ascertain if there is an explanation. Section 5 of the act provides that companies having any portion of their routes within the line designated by section 4, "shall have the right and privilege of constructing that part of the line embraced by their charter, on giving notice to the Trustees of the Internal Improvement Fund of their full acceptance of the provisions of this act, specifying the part of the route they propose to construct." From this section, as well as the whole context and purpose of the act, it is plain that only such companies as had a portion of their line lying within the lines designated by section 4 of the internal improvement law, were entitled to accept the provisions of the act, or claim any such exemption of stock, and hence the A. & F. R. R. Co. cannot claim it.

But we further respectfully submit that in the case of the Atlantic & Gulf R. R. Co. vs. Allen, 15 Fla., 660-1, this court has decided that the exemption from taxation of stock as provided by said section is not such an exemption as carries any immunity to the property of the company. The court holds that the Legislature was merely prescribing a rule of taxation, and intended only to prohibit the taxation of stock as stock. The question of the taxation of stock, as independent from the property which the stock may represent, is not involved in the present case.

There is no allegation in the bill to the effect that the Alabama & Florida Company ever received any aid of any kind from the Internal Improvement Fund other than alter-

nate sections of land; nor is it material to discuss further what aid from the fund it was entitled to under the provisions of the act of December 14, 1855, and the internal improvement law, though we respectfully suggest that it was only to the land-grant benefits of the 29th section of the latter act, and not to the interest guaranty provision. (Trustees Internal Improvement Fund vs. Bailey, 10 Fla.) The notification given by the Alabama & Florida Company to the Trustees could not create any rights which the statutes did not authorize.

We respectfully submit, in view of the above, that there never was any exemption from taxation of the A. & F. Company, or of the property in question as its property.

Chapter 885, which is an act entitled "An act granting to the Alabama & Florida R. R. Company alternate sections of the swamp and overflowed lands," approved January 15, 1859, is nothing more than a grant of the alternate sections of the swamp and overflowed lands lying within six miles on each side of the said Alabama & Florida R. R., the grant being upon the terms and conditions expressed in the 15th section of the internal improvement law. The right for the Legislature to make such a grant was reserved by the 29th section of the internal improvement law.

We respectfully submit here that no other kind of aid or grant could legally have been made by the Legislature from the Internal Improvement Fund. Trustees of Int. Imp. Fund vs. Wm. Bailey, 10 Fla., 112.

And we further respectfully submit, that if any legal force or effect is to be given to the declaration of the 4th section of the act of December 14, 1855, (Chapter 734,) to the effect that the lines of railroad named therein should be considered as proper improvements to be aided from the Internal Improvement Fund, it can only be done by construing it as meaning that a grant of the alternate sections should be made from the fund.

The only explanation that can be given of the passage of Chapter 885, if we give any force or effect at all to the 4th section of Chapter 734, is the failure of the Legislature to use explicit terms in making a declaration of their intention that such aid should be extended by the Trustees of the Internal Improvement Fund, and its subsequent determination to remove all doubts of its intention. There is nothing in Chapter 885 to base any idea or presumption of immunity from taxation upon.

The above statutes being Chapters 483, 610, 734, 885, are the only statutes passed prior to the sale of the property in question and its passing from the ownership and possession of the Alabama & Florida R. R. Company, and we can see no room for holding any other position than that the property was never exempt as the property of said company, and that said company was never so exempt.

II. The second proposition which we submit is, that said property has never been exempted from taxation in the hands of the Pensacola & Louisville R. R. Company, or the appellee, Sullivan. We make two points on this proposition:

1st. Even if it was exempt from taxation while the property of the Alabama & Florida R. R. Co., the immunity from taxation did not pass to the Pensacola & Louisville R. R. Co. or Sullivan.

2d. That no independent lawful grant of such immunity has been made since the Pensacola & Louisville R. R. Company was incorporated, or Sullivan acquired it.

As to the first point we admit that if there had been an express immunity of said railroad, independent of any particular ownership, from taxation, granted by the Legislature of Florida in the charter of the Alabama & Florida R. R. Company, or in any constitutional act passed prior to the adoption of the present constitution, an exemption from

5. The owner of the equity of redemption and five-sixths of a mortgage debt, has an equity to enjoin the sale of land in which he has these interests when it is advertised for sale for a tax to which it is not subject.

Appeal from the Circuit Court for Leon county.

The case was transferred from Escambia county on account of the disqualification of the Judge of the First Circuit to hear it.

The material allegations of the bill are: That appellant, as collector of revenue for Escambia county, levied upon and advertised for sale on the sixth day of August, 1877, for State and county taxes for the year A. D. 1876, amounting to $4,826.84, the track of the railroad situated in said county known as the Pensacola and Louisville Railroad, with the locomotives, passenger, freight, and other cars, and machine shop belonging thereto; that said P. L. R. R. is the railroad formerly known as the Alabama & Florida R. R., and was constructed by said A. & F. R. R. Co., a corporation chartered by an act of the General Assembly of Florida, approved January 8th, 1853, (Chapter 483 of Laws of Florida;) that said A. & F. R. R. with all and singular its stations, depots, buildings, engines, houses, road-bed, superstructure, track, and other improvements and constructions thereon made, and all the rights, privileges, easements, and franchises of said A. & F. R. R. Co., were sold under a decree of foreclosure and sale rendered by the Circuit Court May 31st, 1872, and purchased by the P. & L. Company, a corporation chartered by an act of the General Assembly of Florida, approved February 4th, 1872, (Chapter 1915, Laws of Florida;) that by 18th section of the internal improvement act, (Chapter 610, Laws of Florida,) it was provided: "That the capital stock of any railroad company accepting the provisions of the act shall be forever exempt from taxation, and the roads, their fixtures and appurtenances, including work-shops, warehouses, vehicles, and property of every

description needed for the purpose of freight and passengers, or for the repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction, and for the period of thirty-five years from their completion;" that by the fourth section of an act of General Assembly of Florida, approved 14th of December, 1855, (being Chapter 734 of Laws of Florida) it was provided: "That a line of railroad to be constructed from the city of Pensacola, or any other point or points on the waters of Pensacola or St. Andrews bay, to the north line of the State, leading in the direction of Montgomery, Alabama, shall be considered as proper improvements to be aided from the Internal Improvement Fund in the manner provided by said internal improvement act;" that the said A. & F. R. R. Company availed itself of the benefit of said 4th section of said act,approved December 14th, 1855, by constructing and completing on or about July 1st, 1860, the line of railway therein provided for, to wit: from the City of Pensacola to the north line of the State in the direction of Montgomery, Alabama, and by doing all other things to entitle it to all the benefits of said 18th section of the internal improvement act, and on the 12th day of March, 1856, the said Alabama & Florida R. R. Company notified the Board of Internal Improvement of its acceptance of the terms of the internal improvement act, and of the provisions of the said act approved December 15th, 1855; that by an act approved January 15th, 1859, entitled "An act granting to the Alabama & Florida Railroad Company alternate sections of the swamp and overflowed lands," (being Chapter 885,Laws of Florida,) as well as by the action of the Board of Internal Improvement in setting apart to said railroad, in pursuance of said act, its quota of said lands, the said Alabama & Florida Railroad was recognized and adopted as one of the roads entitled to all the benefits of the internal improvement acts; that the said P. & L. R. R. and the other property levied upon and

taxation annexed by the terms which created it to the railroad property itself, without reference to its ownership, as in the case of New Jersey vs. Wilson, 7 Cranch, 164, then the property could be claimed to be exempt; but such is not the case.

Even admitting, for the sake of argument, that the roads which are a part of the line of railroads designated by the 4th section of the internal improvement law are exempt for the period of thirty-five years from their completion, by virtue of the exemption being annexed by the terms of the internal improvement law to their corpus, irrespective of the transmutations that have or may occur in their ownership, we believe we have shown that the road in question is not a part of that system of roads, and consequently not entitled as such to any immunity from taxation as being annexed to its corpus.

On the other hand, in connection with this first point, we contend that if the appellee claims that any such immunity attached to the property as or on account of its being the property of the Alabama & Florida R. R. Company, or on account of a pretended exemption of the capital stock of that company by virtue of the provisions of the internal improvement law, (an exemption which, as before shown, it cannot legally claim,) that the immunity did not pass to the Pensacola & Louisville R. R. Company by the judicial sale mentioned in the bill of complaint, or to the appellee.

It did not pass to the Pensacola & Louisville Company—

1st. Because the judicial sale was not competent to pass such personal immunity or privilege without express statutory direction or authorization, and there was no such statutory authorization providing that such privilege should so pass, even if the immunity had ever been extended to the Alabama & Florida R. R. Company, and there was no such statutory authority. Morgan vs. Louisiana, 3 Otto, 217; Trask vs. Maguire, 18 Wallace, 391; note 23, 2 Red. on

Railways, pp. 494, 498, 500; 2 Red. on Railways, part 13, sec. 235, sub-division 12.

It not having passed to the P. & L. Company, it consequently has not passed to the appellee. The bill does not show how the appellee acquired his ownership. All we know is that his title is subsequent to that of the P. & L. Company. There is no statute vesting him with any particular franchises or immunities, and his position is clearly at least no better than that of the P. & L. Company. The only franchises he can claim are those essential to the operation and ownership of the road, such as to run cars, take toll, etc.

We respectfully submit, in connection with the second point, to-wit: that no independent lawful grant of any such immunity from taxation has been made since the P. & L. Company was incorporated, or Sullivan acquired it, the following proposition:

That Sec. 18 of Chapter 1915, amending the cha of the P. & L. Company, is, in so far as it pretends to create any exemption from taxation, unconstitutional, being directly contrary to Sec. 24, Art. 16, and Sec. 1, Art. 12 of Constitution of 1868.

III. As to the recognition of the exemption of the Alabama & Florida R. R. corporation involved in the 18th section of Chapter 1915, we respectfully submit that no weighty consideration can be given to it on the basis of legislative construction:

1st. Because it is not contemporaneous but is long subsequent in date, and is isolated, and it relates to a transaction which had accrued before the passage of the act.

2d. Because the attempt of that Legislature in the same section to grant an independent immunity from taxation to the P. & L. Company shows that the Legislature was either indifferent to the provisions of the Constitution of the State on the subject of such exemptions, or careless in ascertaining

them. So palpable a violation of the constitutional provision destroys its claim to any considerable respect in construing the statutes involved.

3d. Because the construction is erroneous, and the State of Florida and appellant have the right to have the decisions of the courts upon the question notwithstanding such legislative construction. Stephenson vs. Doe, 8 Blackford, 508; Feagin vs. Comptroller, 42 Ala., 516; Ogden vs. Blackledge, 2 Cranch, 272; Keyport, &c., Co. vs. Farmer's, &c., Co., 18 N. J. Eq., 13.

IV. Having discussed the particular features of the bill, we respectfully submit the following as the rule of construction of statutes governing in cases wherein exemption from taxation is claimed, and ask that they be applied to this case:

"The intention to exempt must in any case be expressed in clear and unambiguous terms; taxation is the rule, exemption is the exception. All exemptions are to be strictly construed; they embrace only what is in their terms." Cooley on Tax., 146.

"Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. Exemptions, no matter how meritorious, are of grace and must be strictly construed." Cooley on Tax., 146, note 1.

"The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A State cannot strip itself of this most essential power by doubtful words. It cannot by ambiguous language be deprived of this highest attribute of sovereignty." Erie R. R. Co. vs. Pennsylvania, 21 Wallace, 499.

In this case it was held that a grant by the State of Pennsylvania to a New York corporation of the right to exercise a part of its franchises within the limits of Pennsylvania,

which State at the time of the grant laid a particular tax upon said corporation without expressly agreeing not to increase the rate or amount of taxation, did not preclude a right of further taxation of said corporation by the State of Pennsylvania.

Intendments will not be indulged to enlarge the operation of a clause restraining the exercise of a sovereign attribute of a State. As has often been said, the whole community is interested in retaining the power of taxation undiminished, and has a right to insist that its abandonment shall not be presumed in any case where the deliberate purpose of the State to abandon it does not appear. A. & G. R. R. Co. vs. Allen, 15 Fla., 658; Bailey vs. Maguire, 22 Wallace, 215; Ohio Life Insurance & Trust Co. vs. Debolt, 16 Howard, (m.p.) 427; Morgan vs. Louisiana, 3 Otto, 222; Delaware Railroad Tax, 18 Wallace, 206; Providence Bank vs. Billings, 4 Peters, 567.

In the Delaware Railroad Tax case the court say, as does our own court substantially, that "if the point were not already adjudged, it would admit of great consideration whether the Legislature of a State can surrender this power and make its action in this respect binding upon its successors any more than it can surrender its police power or its right of eminent domain."

In the Providence Bank case the court holds that a law of the State of Rhode Island imposing a tax upon the capital stock of a bank does not impair the obligation of a contract arising from its charter which contains no stipulation on the subject of taxation.

Under an exemption of school buildings, a building occupied in part for a school and in part for other purposes is not exempt. Wyman vs. St. Louis, 17 Mo., 335.

An exemption of every school-house and every building erected for the use of a collage, incorporated academy, or other seminary of learning, held not to embrace a building

occupied and used as a private boarding school. Chegary vs. New York, 13 N. Y., 220; State vs. Ross, 24 N. J., 497.

Exemption from "taxation of every kind" does not exempt from an assessment for street improvements. Sheehan vs. Good Samaritan Hospital, 50 Mo., 155.

V. The only remaining question is, whether or not there was any statute of the State of Florida authorizing the assessment and levy of the tax complained of in this suit. The act entitled "An act for the assessment and collection of revenue," (being Chapter 1976 of the Laws of Florida,) authorizes the tax. Vide Secs. 47-8.

R. L. Campbell and *G. A. Stanley* for Appellee.

The Pensacola & Louisville R. R. Company is entitled to exemption from taxation on its road, &c., under the 18th section of the internal improvement act of 6th January, 1855. Laws of 1854, page 16.

Although unnamed in that act, it claims the benefit of it upon the following grounds:

By 4th section of act 14th of December, 1855 (Laws 1855, page 27,) a road leading from Pensacola to the State line, in the direction of Montgomery, was declared admissible into the internal improvement system.

The Alabama & Florida R. R. Co. undertook to and did build the road contemplated by the last mentioned act; and on 12th of March, 1856, did formally signify in writing to the Board of Internal Improvement its acceptance of the legislative permission to become a member of the internal improvement system.

The act of 15th January, 1858, (Laws of 1858, page 31,) recognized the Alabama & Florida R. R. as *the* railroad contemplated by act 14th December, 1855.

On the day of 187 , the P. & L. R. R.

became the assignee by purchase of all the property, rights, franchises, and privileges of the Alabama & Florida R. R. Co.

By the 18th section of an act to amend an act incorporating the P. & L. R. R., approved February 4th, 1872, (Laws of 1872, page 85,) the Alabama & Florida R. R. is recognized as a part of the internal improvement system, and exempt from taxation; and the P. & L. R. R. as entitled to like exemption as the assignee and successor of the former.

The objection to the exemption from taxation, claimed for the Alabama & Florida R. R., rests exclusively upon the wording of 4th section of the act of 14th December, 1855, the argument being that the aid contemplated is confined to aid from the Internal Improvement Fund, but does not embrace aid in the shape of the exemptions provided by 18th section act of 6th January, 1855.

To make the objection even plausible, the 4th section of the act 14th December 1855, must be treated as an isolated act, instead of one of a number of acts in *pari materia,* and therefore to be read as one act. Bryan vs. Dennis, 4 Fla., 485; Howell vs. Howell, 8 Fla., 46.

The declared purpose of the internal improvement act was to create a system to increase the wealth and develop the resources of the State.

The means partly establishing that system was the aid and encouragement provided by the act, and, *inter alia,* exemption from taxation.

If, therefore, the acts of 14th December, 1855, and 12th of March, 1856, and the written acceptance filed with the Internal Improvement Board, brought the Alabama & Florida R. R. into the system, all was done that was necessary to give that road all the benefits of the system, as a consideration for its efforts to do its part towards bringing about a fruition of the system.

Bringing a road into the system necessarily implies that it is brought in to enjoy its proportion of the aids of the system, so far as they might be required.

System implies uniformity, order, rule, harmony. What kind of a system is that which gives to one what it denies to another, and yet is essential to all its constituents?

Exemption from taxation, as well as of employees from civil duties, was as essential to the Alabama & Florida R. R. as it was to any other road in the system.

Every rule of construction, as well as every consideration of policy and duty on the part of the State, forbids the construction that the act of the 14th of December, 1855, was designed to bring into the internal improvement system a disformed member.

Such a construction would be an impeachment of the impartiality of the State in dispensing its aid amongst the co-laborers for increase of its wealth and the development of its resources.

The 18th section of the act to amend an act to incorporate the Pensacola and Louisville Railroad Company, approved February 4th, 1872, furnishes a legislative construction of the above-mentioned acts perfectly consistent with that upon which the bill is framed.

It is not contended that the last-mentioned act exempts the P. & L. R. R. from taxation; but it *is* insisted that it *is* a clear legislative recognition of the exemption of the Alabama & Florida R. R. from taxation, by virtue of legislation antecedent to our present Constitution, of the P. & L. R. R. as the assignee of the Alabama & Florida R. R., and of its exemption from taxation as such assignee.

In this aspect the 18th section of the act of 1872, above referred to, is free from the vice of unconstitutionality; and it is, therefore, the construction which should be adopted.

In acquiring all the property of the Alabama & Florida R. R. Co., as well as its rights, franchises, and privileges.

the P. &. L. R. R. Co. secured to itself, by the assignment, exemption from taxation for the unexpired period of 35 years, as one of the rights enjoyed by the former. 14 Minn., 297; 21 Minn., 315.

In securing the recognition of the Legislature of that assignment and the exemption resulting from it, the P. & L. R. R. Co. secured the assent of the State, which by contract had bestowed it on the Alabama & Florida R. R. Co. Atlantic & Gulf R. R. Co. vs. Allen, 15 Fla., 637.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The Constitution, operative in this State in 1855, provided that "a liberal system of internal improvements being essential to the development of the resources of the country, shall be encouraged by the government of this State, and it shall be the duty of the General Assembly, as soon as practicable, to ascertain by law proper objects of improvement in relation to roads, canals, and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements." In 1855 the General Assembly, reciting this clause of the Constitution, passed an act (Chap. 610, Laws,) "to provide for and encourage a liberal system of internal improvements in this State." In the fourth section of this act the Legislature, in discharge of its constitutional duty to ascertain and declare by law proper objects of improvements, declared that "a line of railroad from the St. Johns river at Jacksonville and the waters of Pensacola Bay, with an extension from suitable points on said line to St. Marks river or Crooked river, at White Bluff, on Apalachicola bay, in Middle Florida, and to the waters of St. Andrews bay in West Florida, and a line from Amelia island in the Atlantic to the waters of Tampa bay in South Florida, with an extension to Cedar Key in East Florida, also a canal from the waters of St. Johns river on

Lake Harney to the waters of Indian river, are proper improvements to be aided from the Internal Improvement Fund."

The 5th section of the act provided that "the several railroads now organized or chartered by the Legislature, or that may hereafter be chartered, any portion of whose routes as authorized by their different charters and amendments thereto, shall be within the line of routes laid down in section four, shall have the right and privilege of constructing that part of the line embraced by their charter, on giving notice to the Trustees of the Internal Improvement Fund of their full acceptance of the provisions of this act, specifying the part of the route they propose to construct, and upon the refusal or neglect of any railroad company now organized to accept, within six months from the passage of this act, the provisions of the same, any other company duly authorized by law may undertake the construction of such part of the line as they may desire to make, and which may not be in progress of construction under a previous charter."

The 18th section of the act provided that "the capital stock of any company accepting the provisions of this act shall be forever exempt from taxation, and the roads, their fixtures and appurtenances, includings work-shops, warehouses, vehicles, and property of every description needed for the purpose of transportation of freight and passengers, or for the repair and maintenance of the roads, shall be exempt from taxation, while the roads are under construction and for the period of thirty-five years from their completion."

A careful examination of this legislation will show that aid to railroad companies as corporations, with power to construct even the lines of railway indicated, was not its primary purpose. The constitutional provision looked to "a liberal system" as "being essential to the development of the re-

sources of the country," and its mandate of duty to the Legislature was to ascertain by law *proper objects* of improvement. In no one of these sections do we find any company named as the one to receive the benefits of the act. If the charters of any companies then existing covered any portion of the *lines ascertained and named as a part of the system,* then, without reference to any incidental benefit which might accrue to these companies, and only because a line or route embraced within their charters came within the system, such companies became entitled to the benefits of the act upon complying with whatever, under its terms, were the conditions upon which a right to such benefits, grants, or exemptions enured or vested. They became entitled to these benefits only through the accidental fact that they had legal rights and franchises vested in them as to certain lines and routes of railway which the Legislature had, in conformity to constitutional duty, declared "proper objects of improvement." This is no where more manifest than in the section granting exemption from taxation, where the rule of taxation fixed is that there shall be no taxation of the capital stock at any time, and that as to the property, "the roads, their fixtures and appurtenances, &c., shall be exempt from taxation while the roads are under construction, and for the period of thirty-five years from their completion." This is a legislative act offering an exemption from taxation of the improvements which the State desired constructed for the time named, in consideration of the acceptance of the provisions of the internal improvement act by the company having the legal right to construct them. Whether this was a correct or wise exercise of legislative discretion, viewed in the light of public policy, is not a judicial question. We will not enter that field. The question here is one of power, not of policy. A simple reading of the internal improvement act, together with the charters of the several companies having the right to construct these roads, or

any part thereof, at the time of its enactment, will show that many additional requirements were made of them by the State through this act. Some of these were the provisions in reference to transportation of the mail, (section 23,) the limitation as to price to be paid for transportation for other roads, (section 25,) and the many requirements as to manner of construction, (section 6).

Our conclusion in reference to this branch of the subject is, that the acceptance of the provisions of the internal improvement act by these companies constituted such act, its requirements and its benefits, a portion of their several charters, that such requirements became the law of their being, and that the grant of exemption by the State was a contract between the State and the companies owning the road. (13 Wall., 264; 15 Fla., 637.) We think also that the right and privilege of exemption is annexed by the terms which create it to the property.

In the case of the State of New Jersey vs. Wilson, (7 Cranch, 164,) it appeared that the Legislature of the State of New Jersey had passed an act authorizing a purchase of lands for the Indians. The act provided that the lands to be purchased "shall not hereafter be subject to any tax." A subsequent act repealed this section granting this exemption. The questions before the court were, what was the effect of the first enactment, and the result of the second. Mr. Chief-Justice Marshall, speaking for the court, says: "The privilege, though for the benefit of the Indians, is annexed by the terms which create it to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale in which alone the question could become material, the value would be enhanced by it." So here, the privilege, the exemption, is annexed to the road itself. We have before said this legislation is throughout as to the roads and their construction. True, the companies are the agents through which their

construction is to be accomplished, but benefit to these companies is the incident; the construction of the road, the completion of the system, the principal.

With these views as to the effect and purpose of this legislation, we next inquire, was the road owned and constructed by the Alabama and Florida Railroad Company extending from "Pensacola bay to the north line of the State leading in the direction of Montgomery, Alabama," a road to which this exemption attached, either by the act of January 6, 1855, or the act approved December 14, 1855, and the subsequent acceptance of the provisions of the act of January 6, 1855, by that company? It is very clear that this road is not embraced in the act of January 6, 1855. The State insists that no road not designated in the fourth section of the act of January 6, 1855, could have become entitled to the benefit of this exemption, and in support of that position calls our attention to the language used by this court in the case of the Atlantic and Gulf Railroad Company vs. Allen, (15 Fla., 651.) We there said: "The term 'roads' in this section (the 18th) refers strictly to the line of road for the construction of which the Internal Improvement Fund was created, and this line of road, a branch road from Live Oak to Lawton, was not embraced therein. To extend the exemption to other roads would be clearly inconsistent with the general purpose of the act, which was to encourage the system created by it, in which system the branch road was not embraced." This view, as applicable to the case then under consideration, was correct. There was no pretence that any act of the Legislature ever made or constituted the branch road from Live Oak to Lawton a proper improvement to be aided from the fund. The question in that case was whether that road, because it was at one time owned by a corporation owning the line of road from Tallahassee to Lake City, was exempt from taxation by virtue of the stock clause of the 18th section. We held not,

and that the exemption belonged only to the roads designated in the 4th section. We had in mind at the time nothing except the internal improvement act. With that as the only law on the subject before us, what we said was correct. As the author of that opinion, however, I do not hesitate to say that the language, unless controlled in reference to the facts then in view and the statutes being construed, was too broad and general. The points in that case were different from those in this. That cannot determine this. To the extent that what is there said covers the new questions here, viz: the extent of the power of the Legislature in December, A. D. 1855, to designate another improvement and give it exemption, and the construction of the act of December 14, 1855, viewed in connection with the act of January 6, 1855, it is mere *obiter* and cannot control. The same is likewise true of the case of Holland vs. The State, (15 Fla., 529.) We had there before us no other statute except the internal improvement act and the act incorporating the J., P. & M. R. R. Co.

Chapter 934, (laws,) is an act to facilitate the construction of the various lines of railroad provided for by the act entitled "an act to provide for and encourage a liberal system of internal improvements in this State," approved 6th January, 1855.

The 4th section of that act provides "that a line of railway to be constructed from the city of Pensacola, or any other point or points on the waters of Pensacola bay, or the waters of St. Andrews bay, to the north line of the State leading in the direction of Montgomery, Alabama, shall be considered as a proper improvement to be aided from the Internal Improvement Fund in the manner provided for, or may hereafter be provided for, in an act to provide for and encourage a liberal system of internal improvements in this State, approved January 6, 1855."

Two questions arise here: What is the effect of this sec-

tion, considered with reference to antecedent legislation, and did the Legislature have power to enact it, in view of the provisions of the antecedent act of 1855? It is insisted that the aid which is derived under the exact terms of this act can come only from the Internal Improvement Fund, and this is true; but it is also true that a road by law entitled to avail itself of the aid extended to other roads for their construction because, like them, under the act of 1855, a part of the internal improvement system. The aid here granted was to be "in the manner provided for" in the act of January 6, 1855, and this road, when it accepted the aid extended, must necessarily have placed itself, and did place itself, under the conditions upon which that aid was extended in the act, as it accepted it as provided in the act.

The 4th section of the act of 1855 did no more designate the lines therein named "as proper improvements to be aided from the Internal Improvement Fund in manner as hereinafter provided." This made them a part of the system.

Granting the power of the Legislature, (the view in which we are now considering the matter,) we have here, within less than twelve months after the passage of the act of January 6, 1855, another act designating this road "as a proper improvement to be aided from the Internal Improvement Fund, in the manner provided by the act of January 6, 1855." If the one provision made a road a part of the system, how can it be that the other does not? Going back to the Constitution itself, it is clear that what was to constitute a particular work an improvement belonging to the system, was a legislative declaration that it was "a proper object of improvement."

It is said also that while this road may be entitled to aid from the Internal Improvement Fund under the act of December, 1855, it is not entitled to exemption from taxation, as that is something different and distinct from such aid, and can

result only from a clear grant by the State. This is true, and it is likewise true that the internal improvement act of 1855 did no more than designate certain lines of road as proper improvements to be aided from that fund. The exemption of no road resulted *ex vi termini* from the internal improvement act. This being done as an inducement to the company or corporation having the right to construct roads belonging to the system, the 18th section of the act provided that the roads, &c., should be exempt upon the *company's accepting the provisions of this act.* The exemption resulted from two facts; first, being designated as a proper object of improvement, and, second, the acceptance by the corporation owning the road thus designated of the provisions of the act, and bringing itself under the rules of construction and other regulations of the act.

So in reference to this line of road. Under the act of December 14, 1855, it became a part of the system. It became a road within the language of the 18th section. That fact existing, upon the acceptance of the provisions of the act of the company having the right to construct the road, the right of exemption, during construction and thereafter for thirty-five years, enured as a right resting in contract, and as attached to the road as a road, and not simply because it was the property of one corporation or another. These two acts are in *pari materia.* They concern the same subject-matter.

The rule of construction, as announced repeatedly by this court, is that such statutes must be construed as one act. This being the rule, we cannot see how any other conclusion can be reached. The whole question is, did this road become a part of the system? If it did, then antecedent legislation as to roads embraced in the system, being in reference to the same subject-matter, become as much applicable to the road last made a part of the system as the one first made so.

The next question is, did the Legislature have power to enact this law? In this connection our attention has been called to the case of The Internal Improvement Fund vs. Bailey, 10 Fla., 113. That case was decided in 1862, about eight years after the passage of the internal improvement act. The Legislature in January, 1861, passed an act to improve the navigation of a river, and directed the cost to be paid from the Internal Improvement Fund. A holder of bonds, before that time issued under the third section of the act, sought to enjoin such appropriation of the fund, and the court held that he was entitled to such injunction. The ground of its action was that the measure of the right of the holder of the bond was the act of 1855; that upon a sale of the bonds therein authorized rights became vested, a contract was brought into existence; that the terms of the law measured its obligation, and that the act, appropriating funds for the improvement of a river, was a violation of the contract, in that it diverted a portion of the funds pledged for the payment of the bond contrary to the terms of the law.

If it be admitted that all of this is true, and we think it is, it does not follow here that the act of December, 1855, was a violation of any right of a bondholder. For while in 1861 it does appear from this case that there was a bondholder, *non constat*, but that there was none in December, 1855, the date of the act here in question. That case is authority for the position that an antecedent bondholder can set aside or enjoin an appropriation of the fund for any purpose to which it was not applicable at the time that his right as a bondholder attached. That was the true question in the case. The equity of the bondholder, the *cestui que trust*, was held affective to restrain and limit the power of the trustee to the terms of the law as it was when his right accrued and when the obligation of his contract attached. But the present case is here upon a demurrer to a bill. No

where in the bill is the existence of a bondholder at any time stated. This, as a matter of course, is a fact of which we cannot take judicial notice, even if it existed at the date named, and if it be any defence by this officer to set it up, he must do so by way of answer. It does not appear from the bill. In what way, however, the equity of a bondholder can be made effective by the State in this matter we cannot see. That, however, is not a question before us at this time.

In the discussion of the case of the Trustees of the Internal Improvement Fund vs. William Bailey, 10 Fla., 125, the court, while admitting the power of the Legislature to designate more objects of improvement than were designated in the 4th section, remarked that "the General Assembly took a wise view of the Constitution, and, therefore, designated in the beginning only a few grand objects, vital to the whole State for improvement, leaving others to wait for their share of State aid until those first inaugurated should have passed successfully through the fiery ordeal of their difficult and doubtful struggle into existence." After naming what the objects designated by the act of 1855 were, the court again says: "After these roads should be built and prove a success, by being able for five consecutive years to pay six per cent. on the capital stock paid in and the interest on the bonded debt, and one per cent. yearly on a sinking fund on said debt, then, as provided by section 27, the Trustees of the Internal Improvement Fund may apply, under the direction of the Legislature, the annual income arising from said fund to other purposes of internal improvement, &c. So it will be seen *that it was not the design to absorb the whole fund* in aiding the designated improvements to the exclusion of all others, but only to postpone all others until those first designated should have been put into successful operation. This, we clearly think, the General Assembly had a right to do."

We have inserted this language of the court in full in

order that the effect given to the 27th section of this act by it in that decision may be clearly seen. The court here simply say that the Legislature had the right to designate some objects of improvement to be constructed first, and to postpone others. While this may be true of this Legislature, it is also true of a subsequent Legislature that its powers were not limited by the powers of the first, unless the act of the first was of such character as called into operation a constitutional limitation, and something more than a simple antecedent exercise of legislative power stood in the way of the exercise of the powers of the subsequent one. The internal improvement act is not organic law, and the power of one Legislature is no greater than another. Where the power of the subsequent one is limited, it results from the fact that the act of the first is of such character that the organic law renders it inviolable through constitutional limitations covering the subject. It may be true, as to this 27th section, that such portion of it as provides that the fund shall pay deficiencies in the interest account is a contract, when viewed in reference to a bondholder. This was perhaps a part of the contract with him, as it was defined by this court in the case of the Trustees of the Internal Improvement Fund vs. Bailey, but we cannot see that such is the case with the remainder of the section, whether viewed in reference to the State, to the Trustees, to the companies, or the bondholders. This section is nothing more than a legislative declaration as to what the Trustees shall do under the direction of a subsequent Legislature, in the event the railroad companies pay for five years six per cent. on the capital stock, the interest on the bonded debt, and the sinking fund. The provision that the *railroad companies indicated by the internal improvement act* shall for five years pay six per cent. on their capital stock, before the annual income arising from the fund is to be applied to some other purpose, if a contract, is a contract with the companies or the stockholders.

We are not prepared to say, and cannot say, that it was within the power of that Legislature to agree with the stockholders of every private corporation embraced in this system that nothing further should be done with the Internal Improvement Fund than was provided in that act until *the stock of each stockholder in these corporations should yield him six per cent.* This Legislature could not make the exercise of the constitutional functions and powers of a subsequent Legislature in reference to the great public trusts attached to these grants conditional upon the fact that the private investment of A., B. or C. should yield him one, two or six per cent. This Legislature, notwithstanding the constitutional limitation as to pleading the *faith and credit of the State,* might, in consideration of a company agreeing to construct a road a part of the system, pledge to the holders of the bonds of the company a part of the public domain applicable to such purpose, and such legislation may be had as to attach to such a grant a constitutional limitation, but one Legislature cannot agree with a stockholder in a railroad company, that unless his stock yields him six per cent., a subsequent Legislature shall not discharge its constitutional legislative duties as to lands which the State holds by virtue of grants from the Federal Government. It might just as well attempt in the charter of a corporation to contract that unless the stock yielded an income of six per cent. a future Legislature should not have power to establish rules of property or to perform the usual functions appertaining to the legislative branch of the government. The legislative power of the State was in this Legislature for the time fixed as the term of office of the persons belonging to that department of the government. The Constitution provided that after that time this legislative power should be in other persons, and this Legislature could pass no law in derogation of this constitutional grant of power to Legislatures following.

In discussing this subject we must recollect the distinction between legislation, which, under the Constitution, amounts to a contract, such as grants of exemption from taxation based upon a consideration. These have been held by the Supreme Court of the United States to be matters lying in grant—things as to which a contract may attach. But the power of the Legislature in reference to an acknowledged continuing public trust and power cannot be limited by accidental circumstances based upon the amount of gain realized from private investments. 17 Geo., 56; 7 Conn., 585; 5 Conn., 538; Cooley's Con. Lim., 125—27.

We conclude from what has been said that upon the face of the bill in this case this road was a part of the internal improvement system. That an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the *road itself, not to the companies*, and that there is nothing on the face of the bill from which the existence of any bond, bondholder, or other thing preventing the power of amendment in the Legislature in December, 1855. In other words, in this bill as demurred to, we can see nothing from which any limitation upon the power of the Legislature of December, 1855, is to be inferred. No limitation as to antecedent contracts operating at the time, so far as this bill discloses, we think the power was clear. While remarking this, we wish it to be understood that we say nothing as to its legal effect, if the then existence of a bondholder is alleged and proved by this officer in his answer.

The next point we notice is that the Pensacola & Louisville Railroad Company is not entitled to this exemption.

The bill alleges that the road was sold under a first mortgage, and that it was purchased by the Pensacola & Louisville Railroad Company. The charter of the A. & F. Company gave it authority to borrow money to carry into effect the objects of the act, and to pledge the property of the

Company for the payment of the same. This gives the power to execute a mortgage of the road, its fixtures, and all the property named in the 18th section of the internal improvement act. 11 Ala., 437; 10 Ohio, 372; 28 Ala., 321; 3 Md., 305; 3 Dutcher, 221; 1 H. &. M., 726; 2 Red. on Railways, §235.

A sale under such a mortgage, therefore, passed the property if the purchaser had the right to purchase. The purchaser, the Pensacola & Louisville Railroad Company, under its charter, had the right to purchase this property, as it was the line of road that it was authorized to construct and operate, and with reference to which it was invested with the general power to purchase. This road thus having acquired the property, the Legislature in 1872 recognized that it had become "the assignee of the Florida & Alabama Railroad, and the franchises of the said corporation," and that it was in possession of and operating the said line of road. The Legislature also gave it the express power to purchase any other railroad. This company, under its charter, had the power to borrow money and to pledge the property of the company for its payment. So far as the right of complainant here is concerned, it is based upon the allegation of the fact "that he is the owner of the equity of redemption of the said Pensacola & Louisville Railroad Company, as well as of all the other property levied upon and advertised for sale by the collector of revenue." In addition to this he alleges that he is "the owner and holder of 532 of the 600 bonds of $1,000 each, to secure which said Pensacola & Louisville Railroad, and all the above mentioned property, as well as its rights, privileges and franchises, are now under mortgage." These facts are admitted by the demurrer.

This bill states enough to show and trace a right to this property in the complainant. It shows, at any rate, such an interest as gives him a standing in a court of equity to enjoin the collection of a void tax. It is not material to

enquire here whether in any of these sales the franchise to be a corporation, or the franchise to operate the road and collect tolls, which are usually held to be appurtenant to the shares, passed to the vendee. The property passed and with it as an incident went the exemption.

While we have examined this question of title in this case, yet we do so in the absence of any point being made in reference thereto, and because in any event our conclusion is the same. We are inclined to the view that upon an allegation of title based upon a judicial decree in a proceeding like this in equity, we should not in this collateral way examine the basis of such decree, or review the questions which the court necessarily passed upon in the exercise of its jurisdiction, nor is this any way to try a right to franchises. We are also inclined to the view that the officer here having advertised this property for sale as the property of the P. & L. Co., is estopped from alleging that it is not its property in this contest. The officer advertises it as the property of the P. & L. Co. Such a levy upon property in the possession of A. as the property of A. cannot be defended by alleging that it is the property of B.

The decree is affirmed.

The foregoing opinion was read at the January Term, A. D. 1878, but leave to file a petition for a rehearing having been thereupon granted the appellant, judgment was suspended and the case continued.

On the 15th day of April, 1878, within the time allowed by the order of the court, the appellant filed the following petition for a rehearing:

To the honorable Justices of the Supreme Court:

Your petitioner, the appellant above named, respectfully represents unto your honors that by the opinion rendered in the above stated cause at the January Term, A. D. 1878,

of said court, the order appealed from overruling the appellant's demurrer to the appellee's bill of complaint stands affirmed. That by said opinion it is held that the railroad in question was made or became a part of the internal improvement system by the act approved December 14, 1855. (Chapter 734, Laws of Florida,) and as such is entitled, upon the showing made by the bill of complaint, to the benefit of immunity from taxation granted by the 18th section of the "internal improvement law," (Chapter 610) to the "roads, fixtures, &c.," within the line designated by section 4 of Chapter 610.

Your petitioner respectfully submits that in this position there is error, and that if given an opportunity he believes he can satisfy the court that while it was the intention of the Legislature that the road in question should receive the aid derivable from the Internal Improvement Fund, it should not have the exemption from taxation.

The language used in the 4th section of Chapter 610, as to the lines of railroads named therein, is as stated by the court in its opinion that those lines "are proper improvements to be aided from the Internal Improvement *Fund* in the manner as hereinafter provided." This section we submit has no efficacy in granting any immunity from taxation except to explain what roads are referred to by the term "roads" in the 18th section. It does not indicate that any grant but such as is derivable from the Internal Improvement *Fund* will be found in the act, but it does include within its scope improvements not included within the scope of the 18th section, to wit: the Indian River Canal. Without the 18th section there would be no basis upon which any road could base a claim to exemption from taxation, and the fact that this 18th section does not include within its scope the properties necessary to a successful operation of the canal, shows how partial the Legislature was to the lines of railroad indicated by the 4th section.

These lines being once constructed under the provisions, and according to the requirements of the act, the exemption from taxation resulted *ex vi termini* from the terms of section 18, because they were the roads referred to in said section.

The doctrine of *in pari materia* should not, we respectfully contend, be held to enlarge the apparent meaning of the terms of a subsequent act in a case like the present, if in any at all. Clearly the language of section 4 of Chapter 734, like the language of section 4 of Chapter 610, does not include within its natural meaning any kind of aid not derivable from the Internal Improvement *Fund*. To the extent of ascertaining what the aid derivable from such fund contemplated by section 4 of Chapter 734 is, and how and upon what terms it is obtainable under the provisions of Chapter 610, these two acts are to be construed as one, but that where the later of two acts by its language includes or proposes to extend the benefit of but one of two kinds of aid derivable from different sources provided by the anterior act, this doctrine of *in pari materia* is to be invoked to stretch the later act beyond the plain meaning of its term and make it include both kinds of aid, cannot be maintained. This we contend is what has been done by this court in this case, and by it the 4th section of Chapter 734 is made to convey a benefit which its language does not include. If the 4th section of Chapter 734 had simply stated that the road in question was a proper improvement to be aided to the extent of the bond endorsement, guaranteeing interest in the manner provided by Chapter 610, the two acts would not be construed *in pari materia* or as one act, except as to the bond endorsement provisions, and on the same principle we contend that Chapter 610 and section 4 of Chapter 734 are to be construed as one act only to the extent that each relates to the aid which is derivable from the Internal Improvement *Fund*. It is only to this extent that both relate

to the same subject. The language used shows that it was not intended by the Legislature to make this road the recipient of all the benefits offered by Chapter 610, and there is nothing more unreasonable or partial in its thus treating this road than in its treatment of the canal on the subject of taxation. Exemption from taxation is founded in partiality and favoritism. That it was not the understanding of the Legislature that this road was made a part of the so-called "system" is shown by Chapter 776, section 2, where the U. S. land grant of May 17th, 1856, to the State is conferred upon the Alabama and Florida Railroad Company. Section 21 of Chapter 610 secured and pledged these lands to the roads within the "system" designated by section 4 of Chapter 610, and if it had been the understanding of the Legislature that Chapter 734 conferred upon this road all the benefits of the system, the 2d section of Chapter 776 would have been deemed unnecessary, and would not have been passed. The theory of its being a part of the system, and therefore entitled to all benefits and immunities, should not be given much weight in the face of the language of Chapter 734, section 4; and whether the railroads and canal, or the means and manner of dispensing aid, are to be considered the "system," there is no reason why the Legislature could not, in enlarging the objects of aid, confine the aid to such only as could be derived from the *fund*. The Legislature of December, 1855, had the internal improvement act before it. That act in its 4th section declared certain lines of railroad "to be proper improvements to be aided from the Internal Improvement Fund in the manner as hereinafter provided." Certain sections in that act prescribe the kind of aid to come from that fund and the manner in which it is to be extended. A certain other and distinct section grants those lines of road a character of aid which cannot come from the *fund*. Knowing what this act was, the Legislature of December, 1855, says that the line of

road in question in this suit shall be considered as proper improvements to be aided from the fund in the manner provided by Chapter 610. The language used shows, we respectfully submit, that it was never intended to grant the immunity from taxation or to make this road a beneficiary of all the kinds of aid which Chapter 610 had prescribed for the other lines.

In consideration of the premises your petitioner prays that he may be fully reheard upon the points above stated, and to that end, and that full justice may prevail, your honors will grant a rehearing in this cause.

MR. JUSTICE WESTCOTT delivered the following opinion denying a rehearing at the June Term, A. D. 1878.

We have examined the petition for a rehearing in this suit. The first position taken is that the 4th section of Chapter 610, the internal improvement law, has no efficacy in granting any immunity from taxation, except to explain what roads are referred to by the term roads in the 18th section of said act. With this view the court does not differ. As a matter of course the Legislature could then only refer to existing legislation, but what were its subsequent powers? The conclusion of the court was that subsequent legislation in terms relating to the same subject-matter gave this road the same rights that other roads had by being embraced in the 4th section. That this legislation made it a part of the system by precisely the same method as the prior legislation made the roads named in the 4th section a part of the system, and that being a part of the system, and accepting the provisions of the act, the immunities of the 18th section followed. Whether a canal designated by the 4th section, and not mentioned in the 18th section, is or is not exempted is a question, the relation of which to the matter here involved we do not see. If such canal is not exempted,

it is simply because the exemption is granted to roads and not canals. This in no way affects the question whether the Legislature has not by subsequent legislation given this road the standing that other roads had under the 4th section; in other words, made it a part of the system.

The language of the act is restricted, it is contended, to aid from the Internal Improvement Fund. This is true. So is the language of the 4th section of Chapter 610 so restricted. The conclusion of the court is that in view of the language of the Constitution and of the Legislature in the 4th section of Chapter 610, the designation of certain roads to be aided from the Internal Improvement Fund constituted them a part of a system, and that companies constructing such lines of road, or were designated proper improvements to be aided from the fund, could, upon the acceptance of the provisions of the act, become entitled to the exemptions specified as to their road. Now it cannot be denied that a road became a part of the system if it was entitled to the benefits of the fund, and became by virtue of its authorized acceptance of the provisions of the act subject to the regulations of the system. This road was designated a proper object of aid from the Internal Improvement Fund in the manner provided for in the act of 1855. Looking to that act, (section 5) one of the conditions upon which the aid was to be granted was a full acceptance of its provisions. This the road has done, and we cannot see how we are to hold that it does not accept and become entitled to this exemption when the 18th section provides expressly that the capital stock of any company accepting the provisions of this act, and the roads, shall be exempt unless the general rule of construction which has controlled us, viz: that acts in *pari materia* must be construed together, is erroneous, or we have made an erroneous application of it.

We understand this to be the rule as to all statutes whether penal, remedial, or of any other character. True,

the degree of strictness to be observed in their construction, looking to the liberty of the citizen on the one hand and the enforcement of his civil rights on the other, is different. It is very evident that two statutes relating to the same subject cannot be construed separately.

We have given this subject all the attention we can. Our views expressed in the opinion in this case are the result of careful examination, and we cannot contemplate a change without doing violence to the rules of law which in our judgment control the subject.

A rehearing is denied.

THE CITY OF ST. AUGUSTINE, APPELLANT, VS. MICHAEL USINA, APPELLEE.

In a common law case an appeal lies only after a final judgment.

Appeal from the Circuit Court for St. Johns county.

The facts of the case are stated in the opinion of the court.

The record in this case was not furnished the Reporter in time to enable him to place it among the other common law cases.

C. M. Cooper for the Motion.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is an action at law by appellee against appellant, in tort. Appellant demurred to the declaration, and the court gave judgment overruling the demurrer and gave appellant time to plead. Without pleading over, the City appealed from the judgment overruling the demurrer. The statute

gives a right of appeal only from a final judgment. The judgment here is merely interlocutory. Nothing has been determined, except that the declaration is good in form and substance. Nothing has been adjudged to the plaintiff, damages or costs. In cases at law there can be no appeal by defendant until the final action of the Circuit Court upon demurrer, or an inquest, confession, or verdict and judgment thereon.

The motion to dismiss the appeal must be granted. So ordered.

ANDREW G., APPELLANT, VS. CATHERINE A., APPELLEE.

1. In a prosecution under the statute for the maintenance of bastard children, the complaint should allege that the mother is a single or unmarried woman.

2. Such a prosecution must be in the name of the State.

3. A denial by the court of the defendant's right to plead any pertinent matter of law or fact in avoidance of or in answer to the complaint and its material allegations is error.

4. The swearing of the jury to try the issue "whether the defendant is the father of the bastard child of the plaintiff," that being the issue framed by the court against the objection of the defendant, as this issue assumes that a child has been born and is a bastard, and is error, it is also erroneous in that the State, and not the complaining witness, is the plaintiff, and the issue is between the State and the defendant, and not between the witness and the defendant.

5. The judgment in proceedings of this character, if against the accused, should be in favor of the State, and not in favor of the complaining witness, the mother of the child.

6. The expenses attending the birth of a bastard child, when allowed by the court under the statute, should be ascertained by proofs and not otherwise, so that the defendant may have an opportunity to contest the facts.

Appeal from the Circuit Court for Manatee county.

The facts of the case are stated in the opinion of the court.

James T. Magbee for Appellant.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is a proceeding purporting to be had under the law for the maintenance of bastards.

Complainant made oath that she had been "delivered of a child, which, by law, would be deemed a bastard, and that one A. G. is the father of said child," and a warrant was issued by a justice of the peace, upon which the sheriff returned that he had "executed the within warrant," and it was afterward filed in the Circuit Court. It does not appear than any issue was made before the justice of the peace, or that an examination was had before him in the presence of the alleged father of the child, or that the justice found that "sufficient cause" appeared to hold the accused to answer before the Circuit Court.

At the Spring Term, 1878, the court, "instead of causing the parties to make up the issue made it up himself, and entered the same upon his docket, in words and figures, as follows: "Whether the defendant is the father of a bastard child, the child of the plaintiff," to which proceeding of the judge the defendant excepted, and objected to further proceeding with the cause.

The case then proceeded in the form of an action of Catherine A. vs. Andrew G. A jury was called and sworn, who, after hearing the evidence, rendered a verdict, "That the defendant, Andrew G., is the father of the bastard child of the plaintiff." Defendant moved for a new trial, on the ground that the issue was not made up according to law; that thereby the defendant was deprived of the privilege of making such defence as the law allows to him, and the court overruled the motion and entered a judgment as follows:

"Whereupon it is ordered, adjudged and decreed that the plaintiff, Catherine A., do have and recover of the defendant, Andrew G., the sum of five hundred dollars, for the support, maintenance and education of said bastard child, to be paid in yearly installments of fifty dollars per year, together with the further sum of fifty dollars for incidental expenses attending the birth of said bastard child, and the further sum of $15.85 for the costs in this behalf expended. It is further ordered and adjudged that the defendant, Andrew G., do enter into bond, with good and sufficient security, to be approved by this court, for the due and faithful payment of the said sums of money at the times therein named, which shall be payable to the court, to be laid out and appropriated under the order of the court, for the support, maintenance and education of the said bastard child."

The defendant appeals from this judgment, and assigns several grounds of error. One ground is that the defendant having produced no evidence on the trial, he was entitled to close the argument to the jury, which was denied him by the court. The record does not show any such denial, nor an exception embracing this point. Another ground of error is, that the court instructed the jury that they had nothing to do with the character of either party, the mother of the child being a witness. There appears in the record no exception to the charge of the jury, or to any part of it, and, therefore, it presents no ground of review by this court. We remark, however, that the question of the credibility of the mother as a witness, to be determined by the jury, she being the complainant and answerable for costs, &c., was ruled upon by the court in the case of Cameron vs. The State, decided at the last term of this court. 16 Fla.

The other alleged errors relate to the making up of the issue by the court, and compelling the defendant to go to trial without giving him an opportunity to plead or demur to the complaint and proceedings, and the allowance of the

sum of fifty dollars for incidental expenses attending the birth of the child, without any proof as to the expenses, and without giving the defendant an opportunity to controvert the same.

It is very evident that the defendant was prejudiced by the proceeding in regard to the making up of the issue. The court may control the making up of the issue according to the statute, but the defendant should have been allowed to object or plead to the sufficiency or substance of the complaint. In doing so, he would doubtless have made the objection that the complaint was not sufficient to hold him to answer.

The statute (Th. Dig., 228,) contemplates that the complainant is a "single woman." It does not appear by the complaint that she was unmarried, yet the issue, as presented by the court, assumes that the woman was unmarried, and that the child was a bastard. "Whether the defendant, Andrew G., is the father of the bastard child of the plaintiff, Catherine A.," was the issue which the jury was sworn to try according to the record, thus assuming that there was a bastard child, and that it was the child of complainant, a single woman. All these facts should be open to controversy.

The statute providing that the court shall cause an issue to be made up "whether the reputed father is the real father or not," intends that there shall be an issue made upon that fact by the plea or traverse of the accused, or by the order of the court, so that the question shall be distinctly presented to the jury, and is not intended to dispense with, or take for granted without proof, other facts equally important, as, whether the complainant is a "single woman," &c., because the mere proof that a man is the father of a child is not sufficient to establish the bastardy.

The question whether she is a single or unmarried woman is a question of fact, upon which the defendant may

take issue in his pleadings and proofs, and it would be the duty of the court to present the issue distinctly to the jury.

The statement in the complaint that she was "delivered of a child, who, by law, would be deemed a bastard," is that of a legal conclusion drawn by the affiant, unsupported by the statement that she was single, or not a married woman, as the statute requires, to authorize the issuing of a warrant.

The complaint, therefore, does not state facts sufficient to authorize the proceeding, and the defendant should not have been held. He should have been allowed to raise this point by motion or demurrer.

As to the question whether the court should arbitrarily fix, by judicial judgment and without evidence, the amount of the expenses attending the birth of the child, (though this point does not necessarily arise in view of what has been said,) it is deemed proper to say that the court should determine it upon evidence and not upon conjecture. What the amount of those expenses were is a question of fact and not of law.

As to the judgment in this case we remark that it was not warranted by law. The proceeding should be conducted in the name of the State; the issue is between the State and the defendant; it concerns the people and the defendant, and the case is a "prosecution" within the meaning of Sec. 2, Art. 6, of the Constitution.

The complainant is a prosecuting witness, although interested in the event as to costs and compensation.

This judgment, therefore, whereby she recovers the moneys adjudged, is erroneous.

The recovery should be in the name of the State, and the security given to the State, or to the Governor of the State.

This matter was examined also in the case of Cameron vs. The State, above referred to.

The result is, that the judgment must be reversed and the cause remanded, with directions to dismiss the complaint.

REUBEN ROBINSON, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. To authorize a witness to testify as to the reputation of another for truth and veracity in order to impeach him, it is not necessary that he should know what a majority of his neighbors or associates say or think of his character for truth.
2. If a witness testifies that he knows the reputation for truth and veracity of the party to be impeached where he lives, the questions as to whether that reputation is good or bad, and whether from that reputation he would believe him under oath, are proper.
3. The opposing party can, upon cross examination, ascertain the extent of the information of the witness, and the sources of his knowledge

Writ of error to the Circuit Court for Suwannee county.

The facts of the case are stated in the opinion of the court.

White & Bryson for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiff in error was indicted at the Fall Term of the Circuit Court, held in and for the county of Suwannee, in the year 1877, for the murder of one Henry Harrison. The record shows that he was arraigned and plead not guilty. The trial before a jury was commenced on the 4th day of February, 1878, and such proceedings were had that on the 8th day of February the jury found the plaintiff in error guilty of murder in the first degree.

The counsel for the prisoner then made a motion for a new trial upon several grounds of alleged error in the progress of the cause, as well as upon the ground of newly-discovered evidence, which motion was denied by the court, and

the prisoner was sentenced in pursuance of law. From this judgment the prisoner brings his writ of error to this court, and causes his bill of exceptions to be filed.

The assignment of error contains twenty-one grounds, upon which the judgment of the court below is asked to be reversed.

Upon an examination of the record, we find that this court cannot consider many of the errors so assigned, for the reason that the bill of exceptions does not show that the necessary exceptions were taken to the rulings and charge of the court in such way or time as is required by the rules and previous decisions in such cases. The errors which we do consider in such rulings by the court below, are enumerated and stated in such assignment of errors as follows:

VII. Because the court erred in allowing the State solicitor (after A. A. Blackburn, a witness for the prisoner, had sworn that he knew Adam Tyson's reputation for truth and veracity where he lived,) to stop said Blackburn from further testifying in chief, until he should answer the following question affirmatively: "Have you heard a majority of his neighbors and associates speak of his reputation for truth and veracity?"

VIII. The court erred in overruling the objections then and there raised by prisoner's counsel to said question and proceeding in stopping the examination in chief and in allowing said question to be asked.

IX. The court erred in refusing to allow A. A. Blackburn to testify to the reputation of Tyson, a State witness, for truth and veracity, after said Blackburn had said he knew Tyson's reputation for truth and veracity where he lived, until said Blackburn could first say that he had heard what a majority of his neighbors and associates speak of the same.

X. The court erred in allowing the State solictor to stop James B. Hull, witness introduced by prisoner to impeach the reputation of Adam Tyson, a State witness, after said

Hull had testified "that he had known Tyson for several years, and had heard a great many persons speak of his reputation for truth and veracity," from further testifying in chief, until he could say he had heard a majority of his neighbors and associates speak of his veracity, and allowing the State solicitor then and there to ask said question, before said witness should be allowed to finish his testimony in chief.

XI. The court erred in that the court did not then and there sustain the objection made by counsel for the accused then and there made to the asking of said question, but allowed the said question to be asked by the State solicitor, and the said witness stopped from further testifying in chief, until said question should be answered affirmatively.

XII. The court erred in refusing to allow said James B. Hull to testify as to the reputation of Adam Tyson for truth and veracity after said Hull had said he had known said Tyson for several years, and after he had said that he had heard a great many persons speak of his reputation for truth and veracity, unless he could first say that he had heard a majority of his neighbors and associates speak of his reputation for veracity.

The bill of exceptions shows that A. A. Blackburn was sworn as a witness on the trial of the cause upon the part of the defence. He testified: "I know Adam Tyson well; have know him for two or three years; I know his reputation for truth and veracity where he lives." At this point the State solicitor stopped the witness and asked him a question, as follows: "Have you heard a majority of his neighbors and associates speak of his reputation for truth and veracity?" To the asking of which question the counsel for accused then and there objected. The objection was overruled, and the counsel for the accused excepted to the ruling of the court. The witness then answered: "I do not know what a majority say; I know what a good many say; I know

what I think of him." The witness was stopped by the court, which held that if he had not heard a majority of his neighbors and associates speak of his reputation for truth and veracity, he was not a competent witness to impeach the witness', Adam Tyson, reputation for truth and veracity. To which ruling of the court the counsel for accused excepted.

James B. Hull was also called upon the part of the accused, for the purpose of impeaching the same Adam Tyson, and after testifying that he had known Adam Tyson for several years, and that he had heard a great many persons speak of his reputation for truth and veracity, was stopped to have propounded to him the same question put by the State solicitor to the witness Blackburn. Counsel for the accused objected to such question. The objection was overruled and an exception taken. This witness also testified that he had heard a great many persons speak of his reputation for truth and veracity, but he could not say that he had heard a majority of his neighbors and associates speak of the same.

The court then ruled that the witness could not depose as to the reputation or character of said Adam Tyson for truth and veracity, on the ground that he had not heard a majority of his neighbors or associates speak of the same; to which ruling of the court counsel for the accused then and there excepted.

The exceptions taken to the rulings of the court, shutting out the evidence of the witnesses, Blackburn and Hull, who were introduced to impeach the witness Tyson, he having given material evidence on the part of the State, raises the question whether before testifying as to his character for truth and veracity, they must show that they had heard a majority of his neighbors or associates speak of such character. We cannot believe that this is the true rule in cases of impeachment. It is not necessary to establish a character.

either good or bad, that it should have been the subject of conversation between a majority of a person's neighbors or associates, and that they should have expressed an opinion thereon.

In the case of Dave vs. The State, 22 Ala., 23, the judge said "that a witness was competent to speak of another's general character without being able to say that he knew what a majority of the neighbers of the person, whose character was the subject of inquiry, said of him or thought of him." It may so happen that a "man has a reputation well established, either good or bad, and yet a majority of his neighbors may never have spoken upon the subject, or expressed their thoughts in any manner whatever. Again, there may not have been a majority who have expressed an opinion to the witness, nor may he be able to say, with positive knowledge, what a majority think, nor may he have heard any one else say what a majority said or thought, and yet himself be competent to swear what his general reputation is. A person's position in a community may be so obscure that very few of his neighbors know anything of him. His general character may be very circumscribed. To hold that he could not prove his general character, except by witnesses who could swear as to what a majority of his neighbors said or thought of him, would be to deprive him of this species of testimony."

This we believe to be the true rule. In the case here the witness Blackburn had sworn that he know Adam Tyson's reputation for truth and veracity where he lived. The witness Hull had said that he had known Tyson for several years, and had heard a great many persons speak of his reputation for truth and veracity. The foundation for proving what that reputation was had been sufficiently laid, yet the court refused to allow the prisoner's counsel to proceed until it should appear that each of these witnesses had heard

a majority of Tyson's neighbors or associates speak of his veracity.

Had the proper ruling been made by the court, the question might have been asked by the prisoner's counsel whether that reputation was good or bad, and whether from such reputation they would believe the witness, Tyson, under oath? The opposite party then, upon cross-examination, could have ascertained the extent of the information of the witnesses and the sources of their knowledge. Crabtree vs. Hagenbaugh, 25 Ill., 233; Boon vs. Weathered, 23 Texas, 675.

The cases of Gladen vs. The State, and Dixon vs. The State, both in 13 Fla. Reports, and Dukes vs. The State, in 14 Fla., cover substantially the other questions sought to be raised by plaintiff in error.

The judgment reversed and new trial ordered.

ADVISORY OPINION.

IN THE MATTER OF THE TENURE OF OFFICE OF JUDGES OF THE CIRCUIT COURTS.

Where the time for which an office is to be held is fixed by the Constitution, and there is no provision other than that this appointee shall hold for the full term, the fact that a former incumbent did not hold the office for the full term for which he was appointed does not affect the term of a subsequent constitutional appointee. The rule is that where the term of office is fixed by the Constitution, each succeeding incumbent, appointed in accordance with the Constitution, holds the office for the full period.

EXECUTIVE OFFICE,
TALLAHASSEE, FLA., January 18, 1877.

To the Honorable Justices of the Supreme Court of Florida:

Section 15 of Article V. of the Constitution of Florida authorizes the Governor at any time to require your opinion as to the interpretation of any portion of the Constitution upon any question affecting his executive powers and duties.

Section 7 of Article VI. of the Constitution provides that "There shall be seven Circuit Judges appointed by the Governor and confirmed by the Senate, who shall hold their office for eight years. The State shall be divided into seven Judicial Districts, the limits of which are defined in this Constitution, and one Judge shall be assigned to each Circuit."

Section 3 of Article XVI. prescribes the limits of the Circuits.

I have the honor to request your opinion in writing as to whether a Circuit Judge, appointed by the Governor and confirmed by the Senate and duly commissioned for a Circuit, within eight years after the appointment, confirmation and commissioning of the Circuit Judge first appointed for such Circuit after the institution of the government under the present Constitution, holds his office for eight years from the time of his being commissioned, or only for the unex-

pired balance of the eight years for which the original appointee was appointed and commissioned.

Very respectfully,

GEO. F. DREW, Governor.

SUPREME COURT ROOM,
TALLAHASSEE, FLORIDA, January 19, 1877.

His Excellency GEO. F. DREW, *Governor of Florida:*

SIR:—We have your communication of yesterday. You ask whether under the Constitution and laws of this State a Judge of the Circuit Court, appointed by the Governor and confirmed by the Senate, holds his office for eight years in a case where there has been a previous incumbent, who, while appointed for eight years, has filled the office only for a part of that time? Whether in such case the second incumbent, appointed and confirmed in conformity to constitutional authority before the expiration of the time for which a previous incumbent was appointed, holds his office for the full time of eight years, or for the balance of the unexpired time for which the first incumbent was to hold?

The language of the Constitution is plain and simple: "There shall be seven Circuit Judges appointed by the Governor and confirmed by the Senate, who shall hold their office for eight years." (Art. VI., Sec. 7.) The remaining clause of this section provides permanent judicial sub-divisions composing each circuit. There is nothing in this which limits the time of service of one appointee by reference to the time served by a previous one. The plain literal construction of that section is, that whenever the two acts, appointment by the Governor and confirmation by the Senate, unite, the result is that the party is entitled to the office, and the express declaration is that he shall hold the office for eight years. Unless, therefore, there is some other provision of the Constitution limiting or otherwise explaining this language, it must have its usual and ordinary effect. There is nothing here establishing a term of office to exist between fixed dates of months or years, nor is there anything having the most remote reference to an unexpired

term, or to a vacancy in an office, as distinct from the office itself. There is no other provision of the Constitution which changes or affects this section. The only general clause of the Constitution referring to vacancies in office is that found in Sec. 7 of Art. V., and this court has heretofore held (13 Fla., 12,) that the power there granted is not a power to fill an unexpired term but to fill a special vacancy, embraced in the period between the time at which the office is made vacant and the filling of the office by an election. This section, too, relates exclusively to vacancies in elective offices. There being, therefore, no provision in the Constitution by which a vacancy in this office is filled, the Legislature has provided for an incumbent for the time embraced between the origin of a vacancy and the appointment to hold the office for the constitutional period. (Chap. 1633, Sec. 2, Laws of Florida.) This action of the legislative department of the government shows that it did not think that the Governor and Senate were to appoint for the *whole* of the unexpired time embraced in the period for which the first incumbent was to hold, (the remainder of the eight years,) for the reason that this legislation has, for a portion of this period, vested the exclusive power of appointment in the Governor.

The conclusion we reach is that a Judge of a Circuit Court, appointed by the Governor and confirmed by the Senate, holds his office for eight full years, and that no part of a previous eight years during which another has held the office, (but who has vacated it,) enters into the computation of the time for which the second appointee holds. It has been thought that there was some similarity in our Constitution upon this subject and the Constitution of the United States as to terms of office of United States Senators. The classification of Senators and the provisions as to filling vacancies, which are found in the Constitution of the United States, render the cases entirely unlike.

The views we here announce and the conclusion we reach are sustained by the decisions of the courts of New York,

(2 Wend., 266; 9 Wend., 58; 11 Wend., 132,) Maryland, (5 Md., 423; 11 Md., 296,) Wisconsin, (3 Wis., 787,) Texas, (4 Tex., 400,) and Mississippi, (5 Sm.& Mar. 632.) We find no conflict in the authorities upon the subject. The rule is, that where the term of an office is fixed by the Constitution, each succeeding incumbent, appointed in accordance with the Constitution, holds the office for the full period.

The other members of the court concur with me in this conclusion.

Respectfully,

JAMES D. WESTCOTT, JR.,
Justice Supreme Court Florida.

INDEX

TO THE

SIXTEENTH VOLUME OF FLORIDA REPORTS.

ABATEMENT. See *Pleading*, 12.

ACTION, CAUSE OF. See *Contract*, 7; *Evidence*, 6.

ADMINISTRATORS AND EXECUTORS. See *Practice* (*Equity*), 28.

1. A suit by a co-surety against the heirs of a deceased co-surety for contribution is not barred by the statute of non-claim, the administrator having published the notice required by that statute and been discharged and the estate distributed before the cause of action accrued as between the sureties upon their bond. *Gibson* v. *Mitchell, et als.*, 519.

2. The presentation of such claim to the discharged administrator is of no effect. *Id.*

3. After the discharge of an administrator by due course of law and the distribution of the estate to the heirs, a suit in equity for contribution may be maintained against the heirs by a co-surety of the decedent, whose claim arose after the discharge, to the extent of the property or its value which came to the heirs. *Id.*

4. Such suit is not a suit against heirs upon the bond of the ancestor to recover a personal judgment against them, but is in the nature of a suit *in rem* to reach the property of the ancestor. The decision in this case does not conflict with Gilchrist vs. Filyau, 2 Fla. R., 94. *Id.*

5. R. L. M. and F. R. P. were administratrix and administrator of the estate of J. T. M., and F. R. P. being desirous of leaving the State, and of being relieved of the duties and responsibilities of administering, it was agreed that he should surrender the assets to her and she should give him a bond of indemnity, and she with a surety executed to him a bond, which, after reciting the circumstances, concluded with the condition "that if the said R. L. M. shall pay the above claims, [enumerating several claims against the estate in behalf of third parties,] as the same shall be just and proper, and hold the said F. R. P. harmless and forever discharged from said debts or demands, and all other debts or demands that may be brought against said estate, and against all claims and demands of whatever character that may be brought or presented against F. R. P. as administrator as aforesaid, then," &c.; and the alleged breach of the condition was that she had

ADMINISTRATORS AND EXECUTORS—(*Continued.*)

refused to pay a debt of the intestate due to the estate of one H., of which the said F. R. P. was administrator: *Held*, That this was a bond of indemnity only as to all claims against the estate of M. which were not due to F. R. P. in his own right, and not a bond upon which he could recover against her claim due to others; and that he could allege a breach only after his liability growing out of the administration of the estate of M. had been ascertained; that the bond created no new personal obligations to pay the debts, beyond the available assets of the estate of her intestate. *Pittman's Adm'r* v. *Myrick*, 69a.

6. A sheriff does not become an administrator *ex-officio* of an intestate estate until empowered by the probate court to act as such, and until that event he can do no act, or consent to nothing, to bind the estate. *Wilson's Adm'r, et al.*, v. *Dibble*, 78a.

7. Heirs at law are not proper plaintiffs in action for unlawful detainer, where defendant is in possession under a lease made by the ancestor in her life-time. The right of possession and consequently the right of action passes to the Administrator or Executor as an incident of the asset. *Scott, et ux.*, v. *Lloyd*, 151.

AGENCY.

A member of a copartnership, after the dissolution, has no *agency* growing out of the former partnership relation to create or to perpetuate a liability of his late copartner for partnership indebtedness, as against the operation of the statute of limitations. *Tate* v. *Clements*, 339.

AMENDMENT.

I. Of Pleadings. See *Pleadings*, 2.
II. Of Proceedings and Records. See *Pleadings*, 2; *Practice (Laws)*, 20, 21; *Records of Court, Arrest of Judgment.*
III. Of Statutes. See *Constitutional Law*, 2, 13.

APPEALS. See *Bill of Exceptions, Exceptions, and Writ of Error.*

1. The Supreme Court has authority to prescribe a rule requiring appellant to give a bond or make a deposit for costs with the Clerk. *Robinson* v. *Roberts*, 156.

2. An order of the Circuit Judge refusing to allow a supersedeas upon an appeal from the County Judge in a case at law, is not a final judgment from which an appeal, or writ of error will lie. *Semble*: There is no provision of the Constitution or statutes authorizing a review in the Supreme Court, by appeal or writ of error, of a determination by the Circuit Court upon an appeal from a judgment of the County Judge in proceedings before him, relating to the unlawful detention of lands and tenements. *Barnett* v. *Togni*, 328.

3. This court has jurisdiction to hear and determine an appeal from a judgment rendered by a Circuit Court in an action brought under the

APPEALS—(*Continued.*)

statute in relation to the maintenance of bastard children. *John D. C.* v. *State, ex rel.*, 554.

4. It is a recognized doctrine that an Appellate Court may look beyond the bill of exceptions, and consider vital errors apparent on the face of the record, as where the complaint clearly shows that a right of action in the plaintiff does not exist. *Pittman's Adm'r* v. *Myrick*, 692.

5. An appeal will not be dismissed on account of the failure to file an assignment of errors within the time appointed, if the assignment be filed before the motion is determined and the appellant comply with such terms as may be imposed by the court. *Pittman's Adm'r* v. *Myrick*, 401.

6. Where there is a judgment against two parties, and the bond or undertaking describes the judgment as a judgment against one only, this is a ground for a motion to dismiss the appeal. *Id.*

7. When a notice of appeal has been given in good faith, and the appellant has failed, by mistake, to give the necessary security in order to perfect the appeal as required by the Code, and these facts are shown to the satisfaction of the court, the appellant will be allowed to perfect the appeal by giving the necessary security. *Id.*

8. A Sheriff, who is a party defendant to a bill filed for the purpose of enjoining proceedings instituted to exempt personal property from levy and sale, and to subject such property to sale, and having no interest in the result, is not a necessary party to an appeal from a decree subjecting such property to levy and sale. *Loring* v. *Wittich*, 495.

9. Under the statute of this State and the code practiced as modified, an appeal lies from a final judgment by default, which is similar in its character to a decree *pro confesso* under the practice anterior to the code. Such judgment must conform to the matter of the pleadings of which defendant has notice, the plaintiff not being allowed to take such decree as he can abide by. A judgment by default, inconsistent with the case made in the original complaint and conforming to a new case made by an amended and supplemented complaint, filed three months after service of summons upon the defendant, without notice to him, is not authorized by the code practice as modified by statute in this State. *State and Trustees* v. *J. P. & M. R. R. Co., et als.*, 708-9.

10. After the time (10 days) allowed by law for taking an appeal, the appeal not being perfected, the Legislature passed an act allowing thirty days, and extending its provisions to cases in which judgment had already been entered: *Held*, that the act extending the time and reviving the proceeding for obtaining a review by appeal, applied only to the remedy and did not affect a vested right. Two years are allowed for writs of error by which the review could be obtained, and it was competent to extend the time of appealing to the full term of

APPEALS—(*Continued.*)

two years, in the discretion of the Legislature. *Alvord, Kellogg & Campbell* v. *Little*, 158.

11. In a common law case an appeal lies only after a final judgment. *City of St. Augustine* v. *Usina*, 829.

APPELLATE PRACTICE. See *Appeals, Bill of Exceptions, Exceptions, Jurisdiction (of Supreme Court), New Trial, Practice, (Equity*, 14, *Law*, 42,) *Remittitur, Supreme Court.*

APPRENTICESHIP. See *Office and Officer*, 4.

ARRAIGNMENT. See *Criminal Law*, 4.

ARREST OF JUDGMENT.

A motion in arrest of judgment made at one term cannot (under the statutes of this State, be changed by amendment, or otherwise, at a subsequent term into a motion for a new trial. *Sedgwick* v. *Dawkins*, 198.

ASSIGNABILITY OF CONTRACTS. See *Contracts*, 8, 11.

ASSIGNEE OF CHOSE IN ACTION, RIGHTS OF. See *Contracts*, 11.

ASSIGNMENT OF ERRORS. See *Appeals*, 5.

ATTACHMENTS.

1. The trial of the issues of fact upon the traverse of the affidavit upon which a writ of attachment was issued, if a jury be demanded, must be had in the county where the suit is pending. *Canova* v. *Colby & Gould*, 167.

2. *Semble*: That the affirmative of the issues of fact upon such traverse is with the plaintiff; he must prove the truth of the allegation in the affidavit to the satisfaction of the court or jury, in order to sustain his writ. *Id.*

3. In a suit commenced by summons, and in which an attachment is issued at the same time, a motion to dissolve the attachment will not prevent the plaintiff entering the defendant's default for not pleading. *Loring* v. *Wittich*, 617.

ATTORNEYS AND SOLICITORS. See *Costs*, 1, 2.

BAIL. See *Criminal Law*, 1, 2.

BAILIFFS. See *Office and Officer*, 6.

BASTARDS AND BASTARDY.

1. This court has jurisdiction to hear and determine an appeal from a judgment rendered by a Circuit Court in an action brought under the statute in relation to the maintenance of bastard children. *John D. C.* v. *State, ex rel.* 554.

2. The form of the judgment ordered by the court in such cases should be in strict compliance with the directions of the statute. *Id.*

3. In a prosecution under the statute for the maintenance of bastard

BASTARDS AND BASTARDY—(*Continued.*)

children, the complaint should allege that the mother is a single or unmarried woman. *Andrew G.* v. *Catherine A.* 830.

4. Such a prosecution must be in the name of the State. *Id.*

5. A denial by the court of the defendant's right to plead any pertinent matter of law or fact in avoidance of or in answer to the complaint and its material allegations is error. *Id.*

6. The swearing of the jury to try the issue "whether the defendant is the father of the bastard child of the plaintiff," that being the issue framed by the court against the objection of the defendant, as this issue assumes that a child has been born and is a bastard, is error; it is also erroneous in that the State, and not the complaining witness, is the plaintiff, and the issue is between the State and the defendant, and not between the witness and the defendant. *Id.*

7. The judgment in proceedings of this character, if against the accused, should be in favor of the State, and not in favor of the complaining witness, the mother of the child. *Id.*

8. The expenses attending the birth of a bastard child, when allowed by the court under the statute, should be ascertained by proofs and not otherwise, so that the defendant may have an opportunity to contest the facts. *Id.*

BILL OF EXCEPTIONS. See *Exceptions, Practice, (Law).*

1. What purports to be a bill of exceptions, unattested by the signature of the Judge, but signed and agreed to by counsel for the respective parties, and filed here as an original paper, cannot be considered in this court. *Robinson* v. *Mathews,* 319.

2. A bill of exceptions, to be available, must be signed by the Judge, and an original paper purporting to be a bill of exceptions filed in this court, in addition to and separate from the record as regularly certified, constitutes no part of the record of the judgment of the Circuit Court, and where otherwise there is no error alleged or perceived, the judgment will be affirmed. *Id.*

3. Where there is no bill of exceptions in a case at law, attested by the judge or by bystanders, as provided by statute, the Supreme Court cannot examine the testimony and proceedings had at the trial, or upon a motion for a new trial. The court cannot examine questions arising on the trial, or on such motion, presented by mere agreement of counsel. *City of Jacksonville* v. *Lawson,* 321.

4. When the bill of exceptions does not bring up all the evidence taken upon the trial of the cause, the court will infer that there was sufficient introduced to warrant the finding of the jury. *Story and Sullivan* v. *State,* 564.

5. A bill of exceptions was settled and signed by the Judge on the 29th day of May, 1878, as of the 4th day of May, 1878, the 29th being beyond the time allowed by the special order of the court within which to make such bill of exceptions, and the 4th within such time. No

BILL OF EXCEPTIONS—(*Continued.*)

laches existing on the part of the appellant, the bill having been placed in the hands of the Judge for signature within the time, and the cause having been brought into and heard by the Appellate Court at the first term thereof after the judgment: *Held*, That in a case of this character, controlled entirely by the rules of the court, the court will consider the circumstances surrounding it, and in this case will consider the bill of exceptions as properly here. *Mayo* v. *Hynote*, 673.

6. It is a recognized doctrine that an Appellate Court may look beyond the bill of exceptions and consider vital errors apparent on the face of the record, as where the complaint clearly shows that a right of action in the plaintiff does not exist. *Pittman's Adm'r* v. *Myrick*, 692.

7. The time for serving and settling exceptions, under the Code, may be enlarged by the court or judge. *Pittman's Adm'r* v. *Myrick*, 401.

BILL OF REVIEW. See *Pleading*, 13, 14.

BOARD OF STATE CANVASSERS. See *Elections*, 1, 2, 3, 4, 5.

BONDS. See *Administrators and Executors*, 1-5; *Appeals*, 1-6; *Florida State Bonds, Internal Improvement Act and Fund.*

CAUSE OF ACTION. See *Contract*, 7; *Evidence*, 6.

CHANCERY JURISDICTION. See *Practice* (*Equity*) 4, 5, 18, 30, 31.

CHARGE OF COURT TO JURY. See *Exceptions, Jurors and Jury.*

1. Where a charge embraces several distinct propositions, a general exception to the charge is not available if any one of the propositions is correct. *Dupuis* v. *Thompson*, 69.

2. It is not necessary that the court in charging the jury, as requested by counsel, should use the language of the counsel in announcing legal propositions; and when the Court has already instructed the jury upon a question, it is not error to refuse to repeat the matter so charged, however correct the proposition may be. *Nickels and Gautier* v. *Mooring*, 76.

3. Where the trial is by jury, the charge of the court must be excepted to when given. Such is the rule when the bill of exceptions is framed under the statute of Westminster II., and such is the rule under the Code. *Coker and Scheiffer* v. *Hayes*, 368.

4. It is the rule of the Code, as well as of the common law practice, that a party cannot, during the progress of a trial, rely with confidence on the strength of his case, take no exception to matters as they occur, or to the charge of the court as given, and afterwards claim the right, either through a motion for a new trial, or otherwise, to have matter already acquiesced in and accepted by him reviewed in an Appellate Court. *Coker and Scheiffer* v. *Hayes*, 368.

5. An exception to a portion of the charge of the court to the jury, to be available as error on review, must be to a separate, particular and

CHARGE OF COURT TO JURY—(*Continued.*)

specific portion of such charge. The language used by the court should be designated; a general exception fails if any part of such charge is correct. *John D. C.* v. *State ex rel.*, 554.

6. Exceptions to the charge of the court must be taken at the time the instructions to the jury so complained of are given, and the evidence of that fact must appear in the bill of exceptions. *Story and Sullivan* v. *State*, 564.

7. To enable a party to avail himself of the error in the court refusing to instruct the jury as requested, the attention of the court must be called to the particular points upon which such instruction is asked and that before the jury shall have retired to consider of their verdict. *Id.*

CIRCUIT COURT. See *Constitutional Law*, 6; *Jurisdiction*, (*of Circuit Courts;*) *Office*, 1, 5, 6, 7.

CIRCUIT JUDGES. See *Office*, 1-5.

CLERKS OF CIRCUIT COURT. See *Judgments*, 1-6.

COLLECTOR OF REVENUE. See *Principal and Surety*, 1, 2; *Injunction*, 1-5.

1. Under the Statute of this State the Collector of Revenue is paid commissions with reference to amounts collected, under a warrant issued anually by the Assessor of Taxes, which warrant, with the annual assessment roll, is placed in the hands of the Collector. The commissions are fixed by law with reference to the amount of collections made on each revenue account for each year, and not with regard to the sums which may be collected by each officer engaged in such service. In this case no question of jurisdiction is raised or considered, it being immaterial in view of the conclusion reached. *State ex rel.* v. *Drew*, 303.

2. A note whereby the maker promises to pay a sum of money "for value received on account of taxes on the property of the estate of L. and others for the year 1872," does not give a right of action to the payee, as the law does not recognize this mode of collecting taxes, and there is no allegation in the declaration that payee had paid the taxes for or at the request of the maker. *Dickson* v. *Gamble*, 687.

3. A tax-collector cannot enforce a note given him for taxes which it is his duty to collect, particularly as it is not alleged that he paid or discharged the taxes mentioned at the request of the maker. *Id.*

4. Whether the publication of the list of lands advertised to be sold for unpaid taxes by a collector creates the relation of debtor and creditor as between the collector and the publisher, *quere? Id.*

COMITY. See *Constitutional Law*, 7.

COMMISSIONS AND FEES. See *Collector of Revenue, Costs, Master in Chancery.*

COMMITMENT. See *Criminal Law*, 1, 2, 5.

COMMON CARRIERS.

The Pensacola and Perdido Railroad Company is a common carrier. At common law such common carrier cannot charge excessive or unreasonable rates of freight. The common law protects the individual from extortion and limits the carrier to a reasonable rate, but there is no common law rule requiring equal rates. What is charged one person, and the tariff of rates, are but matter of evidence to determine whether a charge is a reasonable compensation for the service performed. *Johnson* v. *Pensacola & Perdido R. R. Co.*, 623.

CONCURRENT JURISDICTION. See *Jurisdiction (of Probate Judge, &c.)*

CONSTITUTIONAL LAW. See *Office and Officer*, 5.

1. After the time (10 days) allowed by law for taking an appeal, the appeal not being perfected, the Legislature passed an act allowing thirty days, and extending its provisions to cases in which judgment had already been entered: *Held*, That the act extending the time and reviving the proceeding for obtaining a review by appeal, applied only to the remedy and did not affect a vested right. Two years are allowed for writs of error by which the review could be obtained, and it was competent to extend the time of appealing to the full term of two years, in the discretion of the Legislature. *Alvord, Kellogg & Campbell* v. *Little*, 158.

2. The act of the Legislature of A. D. 1877, chapter 3010, entitled "an act to amend section 3, chapter 1628, Laws of Florida, relating to jurors, and repeal chapter 2043, Laws of Florida, approved February 20, 1875," not only amends and repeals the particular sections specified, but makes further provisions upon matters properly connected with the subject of the acts affected by the amendment and repeal: *Held*, That the subject of the act being expressed in the title of the amending act, the Legislature was not restricted by the constitution to the mere amendment or repeal so expressed, and it was competent to include in the act other provisions of law upon the same subject and properly connected therewith. *Gibson* v. *State*, 291.

3. An act providing that juries, to be empaneled for the trial of causes, civil or criminal, should be composed of six men, is authorized by the constitution as amended in 1875. *Id.*

4. The provisions of Sections 43 and 44 of Chapter 2040, Laws of 1875, which authorize the filing of a transcript of the judgment of a Justice of the Peace in the office of the clerk of the Circuit Court, and the entry of a memorandum of the filing of such transcript in the judgment docket, and the issuing of execution on such judgment by the clerk, are held to be not in conflict with Section 8 of Article VI. of the Constitution. The proceeding does not call into action or depend upon the jurisdiction of the Circuit Court. Whether the judg-

CONSTITUTIONAL LAW—(*Continued.*)

ment so docketed becomes "a judgment of the Circuit Court," is a question not necessarily involved, as the statute may be operative without reference to it. *Bucky* v. *Willard*, 330

5. A part of a statute, or section of a statute, may be unconstitutional and void without affecting the validity of other parts, if they be not dependent upon each other. *Id.*

6. Whether a Circuit Court has the power to set aside an execution issued by the clerk upon a transcript of a justice's judgment: quere? (See Th. Dig., 360, Sec. 6.) *Id.*

7. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manfacturing purposes, &c., passed by the Legislature of New York, which provided, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last instalment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers, and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed The Courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

8. The Constitution exempts a certain amount of personal property to "the head of a family residing in this State:" *Held*, That an averment that a party "is and has been a citizen of said State since May, 1876; that at that time he came to Pensacola in said State from Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since that time, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by removing elsewhere;" is a sufficient statement that he is the head

COMMON CARRIERS.

The Pensacola and Perdido Railroad Company is a common carrier. At common law such common carrier cannot charge excessive or unreasonable rates of freight. The common law protects the individual from extortion and limits the carrier to a reasonable rate, but there is no common law rule requiring equal rates. What is charged one person, and the tariff of rates, are but matter of evidence to determine whether a charge is a reasonable compensation for the service performed. *Johnson* v. *Pensacola & Perdido R. R. Co.*, 623.

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7. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manufacturing purposes, &c., passed by the Legislature of New York, which provided, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last instalment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers, and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed The Courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

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of a family residing in this State to entitle him to claim an exemption. *Loring* v. *Wittich*, 498.

9. The Legislature intended that the trust created by the 2d section of the Internal Improvement Act should be subject to, and to some extent controlled by its subsequent provisions. *Trustees I. I. Fund* v. *St. Johns Railway Co.*, 531.

10. The 29th section of this act reserving to the General Assembly the power to grant alternate sections of swamp and overflowed lands to railroad companies to the extent therein mentioned, operated as a limitation upon the trust and the power of the Trustees. *Id.*

11. The 13th section of the charter of the St. Johns Railway Company donating alternate sections of swamp and overflowed lands to this company for six miles on each side of its road, harmonizes with the principles and purposes of the act of Congress granting these lands and with the express provisions of the Internal Improvement Act of this State, and does not impair the obligation of any contract between the creditors of the trust fund and the State or Trustees of the Internal Improvement Fund. *Id.*

12. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The Internal Improvement Act is not organic law. *Id.*

13. Chapter 3045 of the Laws of Florida, being "An act in relation to the Florida Agricultural College," is passed in compliance with the constitutional requirements covering the subject. The act being amended by this act is referred to by its title, by its chapter, and the sections amended are re-enacted and published at length. This is sufficient. *State, ex rel.* v. *Knowles, et als.*, 577.

14. The Florida Agricultural College is a public corporation. It was founded by the State of Florida with public moneys derived in trust from the government of the United States. It is within the power of the Legislature to change the Trustees named as corporators. *Id.*

15. The corporators in such a corporation, having made a particular contract with an individual, is no reason why such corporators are not subject to legislative control and removal. *Id.*

16. The Constitution, operative in this State in 1855, made it the duty of the Legislature to designate objects of improvement, which shall constitute a State system. The Legislature in that year, (January 6, 1855,) designated certain improvements as proper objects to be aided from a trust fund created by it and thus establish a system. The primary purpose of this legislation was the construction of the works belonging to the system, not the extension of aid or bounty to the corporations having the right to construct the works so designated. The aid extended by the act was the consideration to the companies, having or to have the right to construct the works, to accept the provisions of the law, thus bringing themselves within the system, subject

CONSTITUTIONAL LAW—(*Continued.*)

to its control and regulations. The designation of a road "as a proper improvement to be aided from the fund" created by the act made it an improvement belonging to the system, and the acceptance of the provisions of the law by the company having the right to construct it, gave the company the rights granted. Each road was, under the terms of the law, exempt from taxation during its construction, and for thirty-five years from its completion. This exemption, rested in contract, was attached to the property and could not be subsequently divested by the State. *Gonsales v. Sullivan*, 791.

17. During the year 1855 the Legislature designated another line of railroad as a proper improvement to be aided from the Internal Improvement Fund, in the manner provided for in the act establishing the system. This constituted the road a part of the system, and upon the company's acceptance of the provisions of the internal improvement act, the right of exemption from taxation attached to the road. These acts, relating to the same subject-matter, must be construed together as one act. *Id.*

18. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The internal improvement act is not organic law. It was subject to modification by a subsequent Legislature, whenever its power was not thus limited. *Id.*

19. A prior Legislature cannot make the exercise of constitutional power and duty by a subsequent one depend upon the amount of gain which individuals may realize from private investments. *Id.*

CONTRACTS. See *Constitutional Law*, 9-12, 14-19; *Partnership, Principal and Interest*, 1, *Principal and Surety, Statute of Frauds.*

1. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manufacturing purposes, &c., passed by the Legislature of New York, which provides, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amoont of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last installment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted

CONTRACTS—(*Continued.*)

which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the Statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

2. A deed to land is in the name of, and recites a consideration from B. A., who is not the grantor in the deed, seeks, by parol testimony, to establish that the consideration for the land was money which B. had loaned him, and that the deed was a security for this debt. In such a case, where there is a positive denial in the answer, the clearest and strongest testimony must be produced to establish the loan. *Matthews* v. *Porter* 466.

3. A note whereby the maker promises to pay a sum of money "for value received on account of taxes on the property of the estate of L. and others for the year 1872," does not give a right of action to the payee, as the law does not recognize this mode of collecting taxes, and there is no allegation in the declaration that payee had paid the taxes for or at the request of the maker. *Dickson* v. *Gamble*, 687.

4. A tax-collector cannot enforce a note given him for taxes which it is his duty to collect, particularly as it is not alleged that he paid or discharged the taxes mentioned at the request of the maker. *Id.*

5. Whether the publication of the list of lands advertised to be sold for unpaid taxes by a collector creates the relation of debtor and creditor as between the collector and the publisher, *quere? Id.*

6. R. L. M. and F. R. P. were administratrix and administrator of the estate of J. T. M., and F. R. P. being desirous of leaving the State, and of being relieved of the duties and responsibilities of administering, it was agreed that he should surrender the assets to her and she should give him a bond of indemnity, and she with a surety executed to him a bond, which, after reciting the circumstances, concluded with the condition "that if the said R. L. M. shall pay the above claims, [enumerating several claims against the estate in behalf of third parties,] as the same shall be just and proper, and hold the said F. R. P. harmless and forever discharged from said debts or demands, and all other debts or demands that may be brought against said estate, and against all claims and demands of whatever character that may be brought or presented against F. R. P. as administrator as aforesaid, then," &c.; and the alleged breach

CONTRACTS—(*Continued.*)

of the condition was that she had refused to pay a debt of the intestate due to the estate of one H., of which the said F. R. P. was administrator: *Held*, That this was a bond of indemnity only as to all claims against the estate of M. which were not due to F. R. P. in his own right, and not a bond upon which he could recover against her, claims due to others; and that he could allege a breach only after his liability growing out of the administration of the estate of M. had been ascertained; that the bond created no new personal obligations to pay the debts, beyond the available assets of the estate of her intestate. *Pittman's Adm'r* v. *Myrick*, 692.

7. The "cause of action" in a suit for goods sold is the express or implied promise to pay, and a promise by the party sought to be charged, or facts from which a promise legally results, within the period of the statute of limitations, must be shown to defeat the operation of the statute. *Tate* v. *Clements* 339.

8. Where a party has agreed to do certain work, furnish certain materials, and keep certain premises in repair, and he fails fully to perform his agreement, yet if the work done and material furnished are of value and are accepted by the other party, he is entitled to recover a *quantum meruit* for his work and a *quantum valebant* for his materials. The owner, however, should be held to pay in damages only so much as will make the sum agreed to be paid good, deducting the loss or damage occasioned by the variation from the contract. After a partial performance the rights under such an agreement may be assigned, unless it involves a personal confidence or there is something of a fiduciary character in the transaction. *Tunno and Jessup & Co.* v. *Roberts*, 738.

9. Where a party stipulates to pay a given sum for a defined service and no date is named for payment, the amount becomes due upon the performance of the service contracted for. *Id.*

10. An agreement by which a party enters upon the land of another, and performs labor and service thereon, is not an agreement by which an estate in land is created. Such an agreement to be performed in five years is a personal contract and is valid if in writing, signed by the party to be charged. *Id.*

11. The assignee of a chose in action stands in the place of the assignor, subject to all the equities between the parties. *Id.*

12. In order to constitute a charge against a county the thing for which it was incurred must be authorized by law. No officer can bind either the State or county, unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced. *County of Nassau* v. *Downie*, 171.

CONTRIBUTION. See *Principal and Surety*, 5, 6, 7.

CORPORATIONS. See *Common Carriers, Railroads.*

1. Sureties on the bond of an officer of a private corporation whose office

is annual, with power in him to hold until his successor is elected and qualified, are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer. Guaranteeing the good faith and honesty of such officer "during his continuance in office," means not an indefinite period, or for the time he may possibly hold such office by new elections, but his continuance in office under his then election and for the legal term. *Mutual L. & B. Association* v. *Price & Price*, 204.

2. Sureties upon such bond are not discharged by the neglect of the officers of the corporation to have, as prescribed by the constitution and by-laws of the corporation, periodical examination of the books of the officer whose sureties they are. Mere laches, unaccompanied with fraud, is no ground of discharge. *Id.*

3. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manfacturing purposes, &c., passed by the Legislature of New York, which provides, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded, as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last instalment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted, which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of a stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty, or in the nature of a penalty or forfeiture, for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

4. Chapter 3045, of the Laws of Florida, being "An act in relation to the Florida Agricultural College," is passed in compliance with the constitutional requirements covering the subject. The act being amended by this act is referred to by its title, by its chapter, and the

CORPORATIONS—(*Continued.*)

sections amended are re-enacted and published at length. This is sufficient. *State, ex rel.* v. *Knowles, et als.*, 577.

5. The Florida Agricultural College is a public corporation. It was founded by the State of Florida with public moneys derived in trust from the government of the United States. It is within the power of the Legislature to change the trustees named as corporators. *Id.*

6. The corporators in such a corporation having made a particular contract with an individual, is no reason why such corporators are not subject to legislative control and removal. *Id.*

COSTS. See *Bailiff, Jurors and Jury, Office and Officer*, 6, 7; *County.*

1. Chancery practice forbids a direct taxation of costs as between solicitor and client against defendant; and the Code practice is not different in this respect. *State* v. *Florida Central R. R. Co.*, 703.

2. Where the counsel has been employed to obtain or create a fund for the joint benefit of both parties, his fees, if he prevails, not if he loses, may be paid out of the funds; but where the interests of the parties are adverse, only the legal taxable costs can be allowed. *Id.*

3. Where neither partner is blameless the costs should be divided among the parties in a suit for dissolution and account. *Chandler* v. *Sherman*, 99.

COUNTIES.

1. In 1876 there was no statute making a bill incurred for the board of jurors engaged in the trial of a capital felony a charge against the county in which the trial happened, nor was the board of bailiffs in whose charge such jurors were a charge against the county. *County of Nassau* v. *Downie*, 171.

2. In order to constitute a charge against a county, the thing for which it was incurred must be authorized by law. No officer can bind either the State or county, unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced. *Id.*

COUNTY COURTS. See *Jurisdiction (of Probate Judge).*

COVENANTS RUNNING WITH LAND. See *Lessor and Lessee.*

CREDITOR'S BILL. See *Pleading*, 11.

CRIMINAL LAW. See *Bill of Exceptions*, 4; *Exceptions*, 9, 10, 11; *Habeas Corpus.*

1. Where it appears that a committing magistrate, on complaint that the accused had threatened to do damage to a schooner, and also to do bodily harm to the complainant, issued a warrant of commitment to the jail for want of sureties against doing damage to the property and to keep the peace toward the complainant: *Held*, that this was errone-

BILL OF EXCEPTIONS—(*Continued.*)

laches existing on the part of the appellant, the bill having been placed in the hands of the Judge for signature within the time, and the cause having been brought into and heard by the Appellate Court at the first term thereof after the judgment: *Held*, That in a case of this character, controlled entirely by the rules of the court, the court will consider the circumstances surrounding it, and in this case will consider the bill of exceptions as properly here. *Mayo* v. *Hynote*, 673.

6. It is a recognized doctrine that an Appellate Court may look beyond the bill of exceptions and consider vital errors apparent on the face of the record, as where the complaint clearly shows that a right of action in the plaintiff does not exist. *Pittman's Adm'r* v. *Myrick*, 692.

7. The time for serving and settling exceptions, under the Code, may be enlarged by the court or judge. *Pittman's Adm'r* v. *Myrick*, 401.

BILL OF REVIEW. See *Pleading*, 13, 14.

BOARD OF STATE CANVASSERS. See *Elections*, 1, 2, 3, 4, 5.

BONDS. See *Administrators and Executors*, 1-5; *Appeals*, 1-6; *Florida State Bonds, Internal Improvement Act and Fund.*

CAUSE OF ACTION. See *Contract*, 7; *Evidence*, 6.

CHANCERY JURISDICTION. See *Practice* (*Equity*) 4, 5, 18, 30, 31.

CHARGE OF COURT TO JURY. See *Exceptions, Jurors and Jury.*

1. Where a charge embraces several distinct propositions, a general exception to the charge is not available if any one of the propositions is correct. *Dupuis* v. *Thompson*, 69.

2. It is not necessary that the court in charging the jury, as requested by counsel, should use the language of the counsel in announcing legal propositions; and when the Court has already instructed the jury upon a question, it is not error to refuse to repeat the matter so charged, however correct the proposition may be. *Nichols and Gautier* v. *Mooring*, 76.

3. Where the trial is by jury, the charge of the court must be excepted to when given. Such is the rule when the bill of exceptions is framed under the statute of Westminster II., and such is the rule under the Code. *Coker and Scheiffer* v. *Hayes*, 368.

4. It is the rule of the Code, as well as of the common law practice, that a party cannot, during the progress of a trial, rely with confidence on the strength of his case, take no exception to matters as they occur, or to the charge of the court as given, and afterwards claim the right, either through a motion for a new trial, or otherwise, to have matter already acquiesced in and accepted by him reviewed in an Appellate Court. *Coker and Scheiffer* v. *Hayes*, 368.

5. An exception to a portion of the charge of the court to the jury, to be available as error on review, must be to a separate, particular and

CHARGE OF COURT TO JURY—(*Continued.*)

specific portion of such charge. The language used by the court should be designated; a general exception fails if any part of such charge is correct. *John D. C.* v. *State ex rel.*, 554.

6. Exceptions to the charge of the court must be taken at the time the instructions to the jury so complained of are given, and the evidence of that fact must appear in the bill of exceptions. *Story and Sullivan* v. *State*, 564.

7. To enable a party to avail himself of the error in the court refusing to instruct the jury as requested, the attention of the court must be called to the particular points upon which such instruction is asked and that before the jury shall have retired to consider of their verdict. *Id.*

CIRCUIT COURT. See *Constitutional Law*, 6; *Jurisdiction*, (*of Circuit Courts;*) *Office*, 1, 5, 6, 7.

CIRCUIT JUDGES. See *Office*, 1-5.

CLERKS OF CIRCUIT COURT. See *Judgments*, 1-6.

COLLECTOR OF REVENUE. See *Principal and Surety*, 1, 2; *Injunction*, 1-5.

1. Under the Statute of this State the Collector of Revenue is paid commissions with reference to amounts collected, under a warrant issued anually by the Assessor of Taxes, which warrant, with the annual assessment roll, is placed in the hands of the Collector. The commissions are fixed by law with reference to the amount of collections made on each revenue account for each year, and not with regard to the sums which may be collected by each officer engaged in such service. In this case no question of jurisdiction is raised or considered, it being immaterial in view of the conclusion reached. *State ex rel.* v. *Drew*, 303.

2. A note whereby the maker promises to pay a sum of money "for value received on account of taxes on the property of the estate of L. and others for the year 1872," does not give a right of action to the payee, as the law does not recognize this mode of collecting taxes, and there is no allegation in the declaration that payee had paid the taxes for or at the request of the maker. *Dickson* v. *Gamble*, 687.

3. A tax-collector cannot enforce a note given him for taxes which it is his duty to collect, particularly as it is not alleged that he paid or discharged the taxes mentioned at the request of the maker. *Id.*

4. Whether the publication of the list of lands advertised to be sold for unpaid taxes by a collector creates the relation of debtor and creditor as between the collector and the publisher, *quere?* *Id.*

COMITY. See *Constitutional Law*, 7.

COMMISSIONS AND FEES. See *Collector of Revenue, Costs, Master in Chancery.*

COMMITMENT. See *Criminal Law*, 1, 2, 5.

COMMON CARRIERS.

The Pensacola and Perdido Railroad Company is a common carrier. At common law such common carrier cannot charge excessive or unreasonable rates of freight. The common law protects the individual from extortion and limits the carrier to a reasonable rate, but there is no common law rule requiring equal rates. What is charged one person, and the tariff of rates, are but matter of evidence to determine whether a charge is a reasonable compensation for the service performed. *Johnson* v. *Pensacola & Perdido R. R. Co.*, 623.

CONCURRENT JURISDICTION. See *Jurisdiction (of Probate Judge, &c.)*

CONSTITUTIONAL LAW. See *Office and Officer*, 5.

1. After the time (10 days) allowed by law for taking an appeal, the appeal not being perfected, the Legislature passed an act allowing thirty days, and extending its provisions to cases in which judgment had already been entered: *Held*, That the act extending the time and reviving the proceeding for obtaining a review by appeal, applied only to the remedy and did not affect a vested right. Two years are allowed for writs of error by which the review could be obtained, and it was competent to extend the time of appealing to the full term of two years, in the discretion of the Legislature. *Alvord, Kellogg & Campbell* v. *Little*, 158.

2. The act of the Legislature of A. D. 1877, chapter 3010, entitled "an act to amend section 3, chapter 1628, Laws of Florida, relating to jurors, and repeal chapter 2043, Laws of Florida, approved February 20, 1875," not only amends and repeals the particular sections specified, but makes further provisions upon matters properly connected with the subject of the acts affected by the amendment and repeal: *Held*, That the subject of the act being expressed in the title of the amending act, the Legislature was not restricted by the constitution to the mere amendment or repeal so expressed, and it was competent to include in the act other provisions of law upon the same subject and properly connected therewith. *Gibson* v. *State*, 291.

3. An act providing that juries, to be empaneled for the trial of causes, civil or criminal, should be composed of six men, is authorized by the constitution as amended in 1875. *Id.*

4. The provisions of Sections 43 and 44 of Chapter 2040, Laws of 1875, which authorize the filing of a transcript of the judgment of a Justice of the Peace in the office of the clerk of the Circuit Court, and the entry of a memorandum of the filing of such transcript in the judgment docket, and the issuing of execution on such judgment by the clerk, are held to be not in conflict with Section 8 of Article VI. of the Constitution. The proceeding does not call into action or depend upon the jurisdiction of the Circuit Court. Whether the judg-

CONSTITUTIONAL LAW—(*Continued.*)

ment so docketed becomes "a judgment of the Circuit Court," is a question not necessarily involved, as the statute may be operative without reference to it. *Bucky* v. *Willard*, 330

5. A part of a statute, or section of a statute, may be unconstitutional and void without affecting the validity of other parts, if they be not dependent upon each other. *Id.*

6. Whether a Circuit Court has the power to set aside an execution issued by the clerk upon a transcript of a justice's judgment: quere? (See Th. Dig., 360, Sec. 6.) *Id.*

7. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manfacturing purposes, &c., passed by the Legislature of New York, which provided, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last instalment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers, and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed The Courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

8. The Constitution exempts a certain amount of personal property to "the head of a family residing in this State:" *Held*, That an averment that a party "is and has been a citizen of said State since May, 1876; that at that time he came to Pensacola in said State from Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since that time, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by removing elsewhere;" is a sufficient statement that he is the head

CONSTITUTIONAL LAW—(*Continued.*)

of a family residing in this State to entitle him to claim an exemption. *Loring* v. *Wittich*, 498.

9. The Legislature intended that the trust created by the 2d section of the Internal Improvement Act should be subject to, and to some extent controlled by its subsequent provisions. *Trustees I. I. Fund* v. *St. Johns Railway Co.*, 531.

10. The 29th section of this act reserving to the General Assembly the power to grant alternate sections of swamp and overflowed lands to railroad companies to the extent therein mentioned, operated as a limitation upon the trust and the power of the Trustees. *Id.*

11. The 13th section of the charter of the St. Johns Railway Company donating alternate sections of swamp and overflowed lands to this company for six miles on each side of its road, harmonizes with the principles and purposes of the act of Congress granting these lands and with the express provisions of the Internal Improvement Act of this State, and does not impair the obligation of any contract between the creditors of the trust fund and the State or Trustees of the Internal Improvement Fund. *Id.*

12. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The Internal Improvement Act is not organic law. *Id.*

13. Chapter 3045 of the Laws of Florida, being "An act in relation to the Florida Agricultural College," is passed in compliance with the constitutional requirements covering the subject. The act being amended by this act is referred to by its title, by its chapter, and the sections amended are re-enacted and published at length. This is sufficient. *State, ex rel.* v. *Knowles, et als.*, 577.

14. The Florida Agricultural College is a public corporation. It was founded by the State of Florida with public moneys derived in trust from the government of the United States. It is within the power of the Legislature to change the Trustees named as corporators. *Id.*

15. The corporators in such a corporation, having made a particular contract with an individual, is no reason why such corporators are not subject to legislative control and removal. *Id.*

16. The Constitution, operative in this State in 1855, made it the duty of the Legislature to designate objects of improvement, which shall constitute a State system. The Legislature in that year, (January 6, 1855,) designated certain improvements as proper objects to be aided from a trust fund created by it and thus establish a system. The primary purpose of this legislation was the construction of the works belonging to the system, not the extension of aid or bounty to the corporations having the right to construct the works so designated. The aid extended by the act was the consideration to the companies, having or to have the right to construct the works, to accept the provisions of the law, thus bringing themselves within the system, subject

CONSTITUTIONAL LAW—(*Continued.*)

to its control and regulations. The designation of a road "as a proper improvement to be aided from the fund" created by the act made it an improvement belonging to the system, and the acceptance of the provisions of the law by the company having the right to construct it, gave the company the rights granted. Each road was, under the terms of the law, exempt from taxation during its construction, and for thirty-five years from its completion. This exemption, rested in contract, was attached to the property and could not be subsequently divested by the State. *Gonsales v. Sullivan*, 791.

17. During the year 1855 the Legislature designated another line of railroad as a proper improvement to be aided from the Internal Improvement Fund, in the manner provided for in the act establishing the system. This constituted the road a part of the system, and upon the company's acceptance of the provisions of the internal improvement act, the right of exemption from taxation attached to the road. These acts, relating to the same subject-matter, must be construed together as one act. *Id.*

18. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The internal improvement act is not organic law. It was subject to modification by a subsequent Legislature, whenever its power was not thus limited. *Id.*

19. A prior Legislature cannot make the exercise of constitutional power and duty by a subsequent one depend upon the amount of gain which individuals may realize from private investments. *Id.*

CONTRACTS. See *Constitutional Law*, 9-12, 14-19; *Partnership, Principal and Interest*, 1, *Principal and Surety, Statute of Frauds.*

1. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manufacturing purposes, &c., passed by the Legislature of New York, which provides, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amoont of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last installment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted

CONTRACTS—(*Continued.*)

which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the Statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

2. A deed to land is in the name of, and recites a consideration from B. A., who is not the grantor in the deed, seeks, by parol testimony, to establish that the consideration for the land was money which B. had loaned him, and that the deed was a security for this debt. In such a case, where there is a positive denial in the answer, the clearest and strongest testimony must be produced to establish the loan. *Matthews* v. *Porter* 466.

3. A note whereby the maker promises to pay a sum of money "for value received on account of taxes on the property of the estate of L. and others for the year 1872," does not give a right of action to the payee, as the law does not recognize this mode of collecting taxes, and there is no allegation in the declaration that payee had paid the taxes for or at the request of the maker. *Dickson* v. *Gamble*, 687.

4. A tax-collector cannot enforce a note given him for taxes which it is his duty to collect, particularly as it is not alleged that he paid or discharged the taxes mentioned at the request of the maker. *Id.*

5. Whether the publication of the list of lands advertised to be sold for unpaid taxes by a collector creates the relation of debtor and creditor as between the collector and the publisher, *quære? Id.*

6. R. L. M. and F. R. P. were administratrix and administrator of the estate of J. T. M., and F. R. P. being desirous of leaving the State, and of being relieved of the duties and responsibilities of administering, it was agreed that he should surrender the assets to her and she should give him a bond of indemnity, and she with a surety executed to him a bond, which, after reciting the circumstances, concluded with the condition "that if the said R. L. M. shall pay the above claims, [enumerating several claims against the estate in behalf of third parties,] as the same shall be just and proper, and hold the said F. R. P. harmless and forever discharged from said debts or demands, and all other debts or demands that may be brought against said estate, and against all claims and demands of whatever character that may be brought or presented against F. R. P. as administrator as aforesaid, then," &c.; and the alleged breach

CONTRACTS—(*Continued.*)

of the condition was that she had refused to pay a debt of the intestate due to the estate of one H., of which the said F. R. P. was administrator: *Held*, That this was a bond of indemnity only as to all claims against the estate of M. which were not due to F. R. P. in his own right, and not a bond upon which he could recover against her, claims due to others; and that he could allege a breach only after his liability growing out of the administration of the estate of M. had been ascertained; that the bond created no new personal obligations to pay the debts, beyond the available assets of the estate of her intestate. *Pittman's Adm'r* v. *Myrick*, 692.

7. The "cause of action" in a suit for goods sold is the express or implied promise to pay, and a promise by the party sought to be charged, or facts from which a promise legally results, within the period of the statute of limitations, must be shown to defeat the operation of the statute. *Tate* v. *Clements* 339.

8. Where a party has agreed to do certain work, furnish certain materials, and keep certain premises in repair, and he fails fully to perform his agreement, yet if the work done and material furnished are of value and are accepted by the other party, he is entitled to recover a *quantum meruit* for his work and a *quantum valebant* for his materials. The owner, however, should be held to pay in damages only so much as will make the sum agreed to be paid good, deducting the loss or damage occasioned by the variation from the contract. After a partial performance the rights under such an agreement may be assigned, unless it involves a personal confidence or there is something of a fiduciary character in the transaction. *Tunno and Jessup & Co.* v. *Roberts*, 738.

9. Where a party stipulates to pay a given sum for a defined service and no date is named for payment, the amount becomes due upon the performance of the service contracted for. *Id.*

10. An agreement by which a party enters upon the land of another, and performs labor and service thereon, is not an agreement by which an estate in land is created. Such an agreement to be performed in five years is a personal contract and is valid if in writing, signed by the party to be charged. *Id.*

11. The assignee of a chose in action stands in the place of the assignor, subject to all the equities between the parties. *Id.*

12. In order to constitute a charge against a county the thing for which it was incurred must be authorized by law. No officer can bind either the State or county, unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced. *County of Nassau* v. *Downie*, 171.

CONTRIBUTION. See *Principal and Surety*, 5, 6, 7.

CORPORATIONS. See *Common Carriers, Railroads.*

1. Sureties on the bond of an officer of a private corporation whose office

is annual, with power in him to hold until his successor is elected and qualified, are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer. Guaranteeing the good faith and honesty of such officer "during his continuance in office," means not an indefinite period, or for the time he may possibly hold such office by new elections, but his continuance in office under his then election and for the legal term. *Mutual L. & B. Association* v. *Price & Price*, 204.

2. Sureties upon such bond are not discharged by the neglect of the officers of the corporation to have, as prescribed by the constitution and by-laws of the corporation, periodical examination of the books of the officer whose sureties they are. Mere laches, unaccompanied with fraud, is no ground of discharge. *Id.*

3. Defendant was a stockholder in a company organized under a general act authorizing the formation of corporations for manfacturing purposes, &c., passed by the Legislature of New York, which provides, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in and a certificate thereof made and recorded, as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last instalment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted, which is not to be paid within one year from the time of contracting, nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, That the liability of a stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty, or in the nature of a penalty or forfeiture, for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts. *Flash, Lewis & Co.* v. *Conn*, 428.

4. Chapter 3045, of the Laws of Florida, being "An act in relation to the Florida Agricultural College," is passed in compliance with the constitutional requirements covering the subject. The act being amended by this act is referred to by its title, by its chapter, and the

CORPORATIONS—(*Continued.*)

sections amended are re-enacted and published at length. This is sufficient. *State, ex rel.* v. *Knowles, et als.*, 577.

5. The Florida Agricultural College is a public corporation. It was founded by the State of Florida with public moneys derived in trust from the government of the United States. It is within the power of the Legislature to change the trustees named as corporators. *Id.*

6. The corporators in such a corporation having made a particular contract with an individual, is no reason why such corporators are not subject to legislative control and removal. *Id.*

COSTS. See *Bailiff, Jurors and Jury, Office and Officer*, 6, 7; *County.*

1. Chancery practice forbids a direct taxation of costs as between solicitor and client against defendant; and the Code practice is not different in this respect. *State* v. *Florida Central R. R. Co.*, 703.

2. Where the counsel has been employed to obtain or create a fund for the joint benefit of both parties, his fees, if he prevails, nôt if he loses, may be paid out of the funds; but where the interests of the parties are adverse, only the legal taxable costs can be allowed. *Id.*

3. Where neither partner is blameless the costs should be divided among the parties in a suit for dissolution and account. *Chandler* v. *Sherman*, 99.

COUNTIES.

1. In 1876 there was no statute making a bill incurred for the board of jurors engaged in the trial of a capital felony a charge against the county in which the trial happened, nor was the board of bailiffs in whose charge such jurors were a charge against the county. *County of Nassau* v. *Downie*, 171.

2. In order to constitute a charge against a county, the thing for which it was incurred must be authorized by law. No officer can bind either the State or county, unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced. *Id.*

COUNTY COURTS. See *Jurisdiction (of Probate Judge).*

COVENANTS RUNNING WITH LAND. See *Lessor and Lessee.*

CREDITOR'S BILL. See *Pleading*, 11.

CRIMINAL LAW. See *Bill of Exceptions*, 4; *Exceptions*, 9, 10, 11; *Habeas Corpus.*

1. Where it appears that a committing magistrate, on complaint that the accused had threatened to do damage to a schooner, and also to do bodily harm to the complainant, issued a warrant of commitment to the jail for want of sureties against doing damage to the property and to keep the peace toward the complainant: *Held*, that this was errone-

CRIMINAL LAW—(*Continued.*)

ous. Sureties of the peace against doing damage to property (except as to threats to burn a dwelling-house) are not authorized by the common law or by statute, and imprisonment for want of such sureties is not allowed by law. *Ex-parte Harfourd*, 283.

2. The commitment having been made for want of bail for an act not criminal, and also for a criminal act, is irregular. The security should be fixed according to the degree of the criminal act charged, and the court on *habeas corpus* should, if required by the accused, hear and examine into the evidence for the purpose of determining what criminal act has been committed, and the probable cause shown against the accused, and this, whether the warrant of commitment was regular or irregular. *Id.*

3. In an indictment for procuring property by false pretences, it is not sufficient to charge that the prisoner "designedly, and by a false pretence, and with intent to defraud one A. P., did obtain with such intent the following property." It must charge what that pretence was, and allege specifically that it was false. *Hamilton* v. *State*, 288.

4. The record showing that the defendants were brought into court, that they appeared by counsel, plead to the indictment, were tried and convicted, is sufficient evidence of a proper arraignment. *Story & Sullivan* v. *State*, 564.

Where a party has been tried and convicted of an offence before a Justice's Court, and a fine imposed under the statute, and the Justice in his commitment recites the fact of the conviction and the imposition of the fine, and further directs that the accused "be conveyed to the county jail to be employed at such manual labor as the County Commissioners may direct, which time shall not exceed ninety days," and the statute under which the accused was convicted limits the term of imprisonment to which he may be sentenced to sixty days: *Held*, That so much of the commitment as seems to authorise an imprisonment for ninety days may be treated as surplusage and void, without affecting the legality of the commitment for the non-payment of the fine. The term of the imprisonment for such non-payment is regulated by the statute. The writ of *habeas corpus* is refused. *Ex-parte Hunter*, 575.

6. To authorize a witness to testify as to the reputation of another for truth and veracity in order to impeach him, it is not necessary that he should know what a majority of his neighbors or associates say or think of his character for truth. *Robinson* v. *State*, 835.

7. If a witness testifies that he knows the reputation for truth and veracity of the party to be impeached where he lives, the questions as to whether that reputation is good or bad, and whether from that reputation he would believe him under oath, are proper. *Id.*

8. The opposing party can, upon cross-examination, ascertain the ex-

CRIMINAL LAW—(*Continued.*)

tent of the information of the witness, and the sources of his knowledge. *Id.*

CROSS-BILL. See *Pleading*, 10.

DECREE PRO CONFESSO. See *Appeals*, 9.

1. A service of subpœna upon a sheriff, as *ex-officio* administrator, before he has been ordered by the Judge of Probate to take charge of the estate of a deceased mortgagor, does not authorize a decree *pro confesso*. *Wilson et al.* v. *Dibble*, 782.

2. "Proof by affidavit to the judge" that the order requiring a defendant resident of another State to appear and answer has been published in the manner and for the time prescribed by law, is one of the requirements of the statute in order to perfect a constructive service. This proof must be made before the judge can grant an order taking the bill for confessed. *Tunno and Jesup & Co.*, v. *Roberts*, 738.

DEFAULTS. See *Judgments*, 2, 3.

DEFINITIONS. See *Words*.

DEMURRER. See *Pleading*, 1, 3, 6; *Practice* (*Law*), 5.

EJECTMENT.

1. The action of ejectment is one in which the plaintiff must show that he has not only the legal interest, but a possessory title in and to the permises in controversy before he will be entitled to recover. *Jones* v. *Lofton*, 189.

2. In order to enable a plaintiff to recover in such an action, when his right of possession is controverted, he must prove—first, that he had the legal title to the premises at the time of the commencement of the action; second, that he had the right of entry; and third, that the defendant, or those claiming under him, were in possession at the time the suit was commenced. *Id.*

3. A mortgagee cannot restrain the prosecution of a suit in ejectment (brought by a purchaser under a junior lien) against the mortgagor or his tenant. *Thompson* v. *Maxwell*, 773.

4. Where the verdict of the jury is plainly against testimony, as to which there is no question of credibility, a new trial should be awarded. Hence, in an action of ejectment, under our statute, where there is no question as to the allowance of mesne profits, and where the value is fixed by the testimony, the jury must find some damages. *Duncan* v. *Jackson et als.*, 338.

5. Under the statutes of this State, certain occupying claimants, after judgment of eviction against them, may have the value of their improvements assessed by a jury in a particular manner and under a special charge. This and other provisions of the statute are of such character that the value of the improvements cannot be set off be-

EJECTMENT—(*Continued.*)

fore judgment against the mesne profits recoverable as damages in the action of ejectment. *Id.*

6. A suit in equity to recover the possession of lands under a legal title, and for mesne profits, cannot be maintained. All the issues of law and fact in regard to the title and the rents and profits may be tried in a court of law. *Cavedo* v. *Billings, et al.*, 261.

ELECTIONS: See *Mandamus.*

1. Whether a vote cast at an election was legally cast, or whether an election held on the day appointed of which due return is made to the Board of State Canvassers was a legal election, are judicial questions which the Board of State Canvassers of elections cannot determine. The general power and duty of this Board is to ascertain and declare who received the majority of votes cast. This is a ministerial duty, and its exercise may be controlled by mandamus. *State ex rel.* v. *Board of State Canvassers*, 17.

2. The words "true vote," in the statute governing the Board, mean the actual vote cast as distinct from the strictly legal vote. Where a return is so irregular, false, or fraudulent that the Board is unable to determine the actual vote cast, the entire return, under the statute, should be rejected. While this power to determine the falsity or irregularity is something more than simply counting or computing, still such power necessarily appertains to the discharge of every ministerial duty of this character. *Id.*

3. Where acts admitted to be done by the answer of respondents in a proceeding by mandamus disclose erroneous action and a failure to discharge a ministerial duty imposed by law, and a consequent violation of right, this court has power to order a Board of State Canvassers to reassemble and discharge their duty. *Id.*

4. Under the statute, the proper and only place for the filing of the original certificate of a canvass by the Board of State Canvassers of the votes cast at a general election for Governor in this State, is the office of the Secretary of State. Where such an original certificate is filed in this court as a response to a peremptory writ commanding a canvass, this court should direct its return to its only proper legal place of deposit. While it is the duty of this court to compel the Board of State Canvassers to perform their duties, still the canvass made by them under our order is their canvass. This court is not a Board of State Canvassers. *Id.*

5. Where a canvass for votes cast for persons at an election for the office of Governor of this State is commanded by a peremptory writ, a response showing a canvass of votes cast for other officers is surplusage, which the court of its own motion should strike out. *Id.*

EQUITY AND EQUITY JURISDICTION. See *Chancery Jurisdiction, Estoppel, Injunction, Mortgage, Parties, Practice, (Code,) Practice, (Equity,) Trusts.*

ESTATES OF DECEASED PERSONS. See *Administrators and Executors.*

ESTOPPEL.

Where A. attends conferences of creditors as to the general settlement of the estate of an insolvent debtor, and during this period collects an asset of the insolvent under directions from him to hold the proceeds until settlement with creditors, and afterwards, at a final conference of creditors, resulting in a general assignment, he signs a statement admitting the claim so collected to be an asset of the insolvent, he is estopped from afterwards denying that fact and setting up his own claim as a set-off. *Keyser, Judah & Co.* v. *Simmons, et als.*, 268.

EVIDENCE. See *Witnesses.*

1. After a deed has been offered and read in evidence to the jury without objection, and the party offering it in evidence has closed, it is too late to insist upon the formal proof of its execution. *Dupuis* v. *Thompson*, 69.

2. The legal presumption is that an officer does his duty when acting under a general power, such as a sale under *fi. fa.* A party claiming under a sheriff's deed of this character, need not prove the advertisement when he puts in evidence the judgment, the execution, the levy, the return of the sheriff, and his deed reciting due and legal advertisement and sale. *Id.*

3. A leading question should be permitted only when it appears essential to justice; where a witness is persistently unwilling, or biased, or there exists some like reason, the court should allow it. In some cases a party may and should be permitted to lead his own witness. This matter, however, is in the discretion of the court. It is not ground of error, and Appellate Courts universally refuse to review such exercise of discretion. *Coker & Scheiffer* v. *Hayes*, 368.

4. After a witness has been examined in chief, and is recalled in rebuttal, the court may, very properly, prevent a simple repetition of his testimony. A party after his examination of a witness, and after closing his testimony, has not absolute right to recall this witness to establish matters not in rebuttal. Whether this rule ought to be varied is a question for the Circuit Court, and an Appellate Court, if it interferes at all, should only do so where it sees that injustice has been done through this action. *Id.*

5. Questions leading to testimony apparently not pertinent to any issue are properly overruled. *Id.*

6. Where, upon the face of the record, a question clearly open to the objection that it is leading and suggestive is rejected, and no ground for its rejection appears upon the record, the action of the court must be

EVIDENCE—(*Continued.*)

attributed to this cause, notwithstanding the fact that the inquiry was as to matters properly admissible in rebuttal of antecedent testimony. *Id.*

7. When the bill of exceptions does not bring up all the evidence taken upon the trial of the cause, the court will infer that there was sufficient introduced to warrant the finding of the jury. *Story & Sullivan* v. *the State*, 564.

8. Where the evidence of a debt alleged to exist is a note, bond or mortgage, the party seeking a final decree based thereon should produce such note, bond or mortgage. *State and Trustees* v. *J. P. & M. R. R. Co.*, 708.

9. To authorize a witness to testify as to the reputation of another for truth and veracity in order to impeach him, it is not necessary that he should know what a majority of his neighbors or associates say or think of his character for truth. *Robinson* v. *State*, 835.

10. If a witness testifies that he knows the reputation for truth and veracity of the party to be impeached where he lives, the questions as to whether that reputation is good or bad, and whether from that reputation he would believe him under oath, are proper. *Id.*

11. The opposing party can, upon cross examination, ascertain the extent of the information of the witness, and the sources of his knowledge. *Id.*

12. It is within the discretion of the Court to rule out any improper evidence which has been admitted in the progress of a trial, before the closing arguments of the counsel. *Coker* v. *Merritt's Ex'r* 416.

13. A deed to land is in the name of, and recites a consideration from B. A., who is not the grantor in the deed, seeks, by paral testimony, to establish that the consideratian for the land was money which B. had loaned him, and that the deed was a security for this debt. In such a case, where there is a positive denial in the answer, the clearest and strongest testimony must be produced to establish the loan. *Matthews* v. *Porter*, 466.

14. The statute of this State (Chap. 1983, Laws,) provides that no person interested in the event of an action shall be examined as a witness in regard to any transaction or communication between such witness and the person deceased at the time of his examination, against the assignee of such deceased person. In this case the mortgagee being dead, an interested party cannot be a witness as to any transaction with the mortgagee as against a party deriving by assignment from the mortgagee. *Tunno and Jessup & Co.* v. *Roberts*, 738.

15. A court of record has inherent power to correct the mistakes of its officers, so that its record may speak the truth as to its action. Clerks of the Circuit Court have no authority to enter a judgment, after the expiration of the term, upon a verdict rendered in term. Such an entry,though placed in the minutes as being rendered during term, may be inquired into by the court at a subsequent term, and if no

EVIDENCE—(*Continued.*)

such judgment was rendered by the court, such entry should be corrected. The corrections may be made upon parol evidence, and the presumption in this court is that there was sufficient to justify the action of the Circuit Court. *Sedgwick* v. *Dawkins*, 198.

EXAMINATION OF WITNESSES. See *Evidence, Witnesses.*

EXCEPTIONS. See *Bill of Exceptions, Charge of Court to Jury.*

1. A motion for new trial is not a waiver of exceptions, and if for any reason such motion cannot be considered in this court, and the exceptions during the trial are properly embodied in the record, we can review the rulings of the Circuit Court in this respect. As to this matter the case then stands substantially in the same attitude that it would have been before the statute authorizing a review by this court of the rulings of the Circuit Court upon a motion for new trial. *Dupuis* v. *Thompson*, 69.

2. Where a charge embraces several distinct propositions, a general exception to the charge is not available if any one of the propositions is correct. *Id.*

3. It is the rule of the Code, as well as of the common law practice, that a party cannot, during the progress of the trial, rely with confidence on the strength of his case, take no exception to matters as they occur, or to the charge of the court as given, and afterwards claim the right, either through a motion for a new trial or otherwise, to have matter already acquiesced in and accepted by him, reviewed in an appellate court. *Coker and Scheiffer* v. *Hayes*, 368.

4. A simple objection to a question when asked, without an exception to the ruling if the objection is overruled, presents a case of abandonment of the objection. To make such a point available it is necessary that an exception should be distinctly taken and placed upon the record. *Id.*

5. Where the trial is by jury, the charge of the court must be excepted to when given. Such is the rule when the bill of exceptions is framed under the statute of Westminister II., and such is the rule under the Code. *Id.*

6. The Appellate Court will not review the rulings or the charge of the Court upon a trial by jury, unless exceptions were duly taken before the rendition of the verdict. *Godwin* v. *Bryan*, 396.

7. Exceptions to the decision of the Court upon a motion for a new trial, are of no avail so far as they relate to rulings of the Judge upon the trial of a cause, if such rulings were not excepted to during the trial. This rule prevails as well in cases which arose under the Code as under the former and the present practice in this State. *Id.*

8. The time for serving and settling exceptions, under the Code, may be enlarged by the court or judge. *Pittman's Adm'r* v. *Myrick*, 401.

9. The rule requiring that the Judge presiding at the trial shall settle the

EXCEPTIONS—(*Continued.*)

case on exceptions, does not control where, at the time the case is to be settled, such Judge has resigned. Public duties, upon which depend private rights, do not pass away with the official existence of the Judge resigning, and the duty of settling a case on exceptions devolves upon his successor. In exercising such power this Court must presume that he acted upon reliable information. *Hays' Adm'x* v. *McNealy*, 406.

10. An exception to a portion of the charge of the court to the jury, to be available as error on review, must be to a separate, particular and specific portion of such charge. The language used by the court should be designated; a general exception fails if any part of such charge is correct. *John D. C.* v. *State ex rel.*, 554.

11. Exceptions to the charge of the court must be taken at the time the instructions to the jury so complained of are given, and the evidence of that fact must appear in the bill of exceptions. *Story and Sullivan* v. *State*, 564.

12. To enable a party to avail himself of the error in the court refusing to instruct the jury as requested, the attention of the court must be called to the particular points upon which such instruction is asked, and that before the jury shall have retired to consider of their verdict. *Id.*

EXECUTION WRIT OF. See *Constitutional Law*, 6; *Justice of the Peace*, 1; *Parties*, 1; *Practice* (*Law*), 38.

EXEMPTION OF PROPERTY FROM FORCED SALE.

1. The Constitution exempts a certain amount of personal property to "the head of a family residing in this State:" *Held*, That an averment that a party "is and has been a citizen of said State since May, 1876; that at that time he came to Pensacola in said State from Maine, bringing with him his family, with the intention of making said city his permanent home; that said city has been his home ever since that time, with the intention that it shall continue to be his home, and with no intention of changing his Florida home or citizenship by removing elsewhere;" is a sufficient statement that he is the head of a family residing in this State to entitle him to claim an exemption. *Loring* v. *Wittich*, 498.

In claiming the exemption of personal property levied upon by the sheriff, the only fact necessarry to be sworn to under Section 7, Chapter 1715, Laws of 1869, is that the inventory "contains a true and perfect list of all his personal property." *Id.*

EXTORTION. See *Common Carriers*, 1.

FLORIDA AGRICULTURAL COLLEGE. See *Corporations*, 3, 4, 5, 6.

FLORIDA STATE BONDS. See *Railroads*.

1. Under the provisions of the statutes regulating the exchange of State bonds with the Jacksonville, Pensacola and Mobile Railroad Compa-

FLORIDA STATE BONDS—(*Continued.*)

ny for its bonds, the State was to occupy two relations to the purchasers of the bonds of the State. The first was that of primary debtor to the holder, and the second was that of trustee holding the bond of the company and the lien created by the act to secure payment to the party who advanced money to the company. The Legislature had no authority to create the first relation. It did have power to create the second, and a decree based upon the relation of primary debtor as fixed by the statute is erroneous. The case of Holland vs. The State of Florida, 15 Fla., 456, and the case of The State of Florida, *et al.*, vs. The Florida Central Railroad Company, *et al.*, 15 Fla., 724, commented upon the following, so far as applicable to this case. *State and Trustees I. I. Fund* v. *J., P. & M. R. R. Co., et als.*, 708.

2. A case should not be remanded with directions to modify a judgment therein made, unless the proofs in the record authorize such modification. The existence of *bona fide* purchasers of State bonds is not established by the proofs in this case so as to authorize a final judgment, and this court should not direct any action to be had based upon the existence of such fact. This court is controlled by the record. *Id.*

3. Bonds issued by railroad companies under the provisions of the act of the Legislature of January 10, 1855, were, under the statute, a first lien or mortgage on the roads, the equipments and franchises of the companies issuing them. A sale by the Trustees named in the act having been had and a balance of purchase-money being due, an equitable lien for such balance resulted primarily to the Trustees as the vendors in the sale. A balance of purchase-money being due upon the sale of each road, the right of the vendors is to a sale of each road separately. A sale of both estates for the payment of the aggregate amount of the liens cannot be had. The lien of the Trustees for balance of purchase-money due upon the sale of the Pensacola and Georgia and the Tallahassee Railroads, and the lien of the State as trustee upon the Jacksonville, Pensacola and Mobile Railroad, examined and defined with reference to the parties to this suit. In this case the State admits the existence and priority of the lien of the Trustees. The case of The State of Florida vs. Anderson, *et al.*, 91 U. S., 669, commented upon and followed, so far as applicable to the pleadings and proofs in this case. *Id.*

FORECLOSURE OF MORTGAGES. See *Mortgage; Pleading*, 7.

FRANCHISES. See *Railroads*, 1, 2; *Office and Officer*, 3.

FRAUD. See *Fraudulent Conveyances; Mortgage*, 3.

FRAUDULENT CONVEYANCES.

Mere inadequacy of price in the sale of the property of one in embarrassed circumstances is not evidence of fraud as against creditors,

FRAUDULENT CONVEYANCES—(*Continued.*)

but a sale of property of the value of fifteen to twenty thousand dollars for an indefinite sum, (no price being agreed on,) paid or to be paid, not exceeding $5,000, under circumstances showing that the purchase was made at the solicitation of the seller and because of her pecuniary embarrassments, and the intention of the purchaser to give the grantor and her family the benefit of the proceeds of the property over and above the purchase money, will warrant a decree that the conveyance was fraudulent on the part of the grantor, and that as to the grantee it be held to be a security for the amount advanced by him to or for the benefit of the grantor. *Loring* v. *Dunning & Palmer, et als.*, 119.

FUNDS IN COURT.

Notwithstanding an order directing a complaint to be dismissed, if the court has in its possession funds which have accrued from the management of the property, the subject matter of the suit, it may direct payment of claims incurred for the protection and preservation of the property during the action. *State* v. *Fla. Central R. R. Co.*, 703.

HABEAS CORPUS. See *Criminal Law*, 5.

1. A writ of error is the exclusive method by which a judgment in a habeas corpus proceeding is reviewed in this court.

2. The general statute regulating notice, and the practice in writs of error, do not apply to the writ of error authorized under the statute regulating proceedings upon habeas corpus. The practice in such cases is in the discretion of this court. *Tyler* v. *Painter*, 144.

3. The commitment having been made for want of bail for an act not criminal, and also for a criminal act, is irregular. The security should be fixed according to the degree of the criminal act charged, and the court on *habeas corpus* should, if required by the accused, hear and examine into the evidence for the purpose of determining what criminal act has been committed, and the probable cause shown against the accused, and this, whether the warrant of commitment was regular or irregular. *Ex-parte Harfourd*, 283.

HOMESTEAD. See *Exemption of Property from Forced Sale.*

HUSBAND AND WIFE.

1. The wife's *separate estate* is an equitable estate where the legal title is vested in some other person for her benefit, and the trustee is a necessary party to a suit seeking to charge such estate. *Dollner, Potter & Co.*, v. *Snow et als.*, 86.

2. In such case the complaint must set up the nature of the trust, and show that such a charge is consistent with and conformable to the law of the trust as disclosed by the deed or settlement which created it. *Id.*

3. Neither the Constitution nor the Laws of this State restrict the power of the wife to become the beneficial object of such a grant. Her

HUSBAND AND WIFE—(*Continued.*)

power to acquire such separate estate is in no way restricted. *Id.*

4. At common law, the promissory note of a married woman is void. The Constitution and Statute of this State make no change in this respect. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her. *Id.*

5. There are material differences between the equitable "separate estate" of the wife and the "statutory separate property" of the wife. A complaint or bill seeking to charge either should disclose which class of property is sought to be affected. *Id.*

6. An agreement by which a party enters upon the land of another, and performs labor and service thereon, is not an agreement by which an estate in land is created. Such an agreement to be performed in five years is a personal contract and is valid if in writing, signed by the party to be charged. *Tunno and Jesup & Co.* v. *Roberts*, 738.

7. Such a contract held by a husband and partially performed, may be assigned to the wife under the Constitution and laws of Florida, in payment for her separate moneys advanced to him, and to the extent that he had a right, she can have a remedy. Such an agreement, not negotiable, is a chose in action to which the wife under our laws can in equity acquire a valid title from the husband. *Id.*

8. Where such a chose in action is, by the instrument of transfer from the husband to the wife, made payable to the *wife's assigns*, upon an assignment by her such authority from the husband is sufficient evidence of the assent of the husband to her subsequent transfer or assignment of the chose in action to comply with the requirements of the statute regulating transfers of personal property of the wife. *Id.*

9. The statute which provides that the husband and wife shall join in all sales, transfers and conveyances of the property of the wife, and the real estate of the wife, considered in reference to the personal property of the wife. Thomp. Dig., Sec. 5, 221. *Id.*

10. The assignee of a chose in action stands in the place of the assignor, subject to all the equities between the parties. *Id.*

ILLEGAL CONTRACTS. See *Collector of Revenue*, 3, 4.

INCORPOREAL HEREDITAMENTS. See *Unlawful Detainer*, 1.

INJUNCTION.

1. A court of equity will not entertain a bill for an injunction against a tax collector who threatens to seize personal property without lawful authority, as such seizure would be a mere trespass remediable in a court of law. *Baldwin* v. *Tucker*, 258.

2. Pending the consummation of a sale of land an injunction restraining it was served on the parties, at the suit of a third person; afterwards, by an arrangement by stipulation of the parties, including the plaintiff in the injunction suit, a conveyance of the land was made and the consideration secured by notes and mortgage payable at a day certain, one note without interest and others with interest, which notes

INJUNCTION—(*Continued.*)

and mortgage were deposited with a party in trust, subject to the determination and decree of the court in an injunction suit: *Held*, That the injunction was waived and did not attach to the notes and mortgage, and did not relieve the maker of the notes from the payment of interest thereon after maturity, and he was not restrained by the injunction, or by the arrangement, from paying or tendering the money to the holder when due, according to the legal effect of his promise. *Chandler & Wittich* v. *Wright*, 510.

3. An injunction should not be granted unless the bill contains a prayer therefor, nor should an injunction to stay proceedings at law be granted without bond and securities prescribed by statute, except in cases otherwise specially provided for by law. *Thompson* v. *Maxwell*, 773.

4. A mortgagee cannot restrain the prosecution of a suit in ejectment (brought by a purchaser under a junior lien) against a mortgagor or his tenant. *Id.*

5. The owner of the equity of redemption and five-sixths of a mortgage debt, has an equity to enjoin the sale of land in which he has these interests when it is advertised for sale for a tax to which it is not subject. *Gonsales* v. *Sullivan*, 791.

INTEREST. See *Principal and Interest.*

INTERNAL IMPROVEMENT ACT AND FUND.

1. The Legislature intended that the trust created by the 2d section of the Internal Improvement Act should be subject to, and to some extent controlled by its subsequent provisions. *Trustees I. I. Fund* v. *St. Johns Railway Co.*, 531.

2. The 29th section of this act reserving to the General Assembly the power to grant alternate sections of swamp and overflowed lands to railroad companies to the extent therein mentioned, operated as a limitation upon the trust and the power of the Trustees. *Id.*

3. The 13th section of the charter of the St. Johns Railway Company donating alternate sections of swamp and overflowed lands to this company for six miles on each side of its road, harmonizes with the principles and purposes of the act of Congress granting these lands and with the express provisions of the Internal Improvement Act of this State, and does not impair the obligation of any contract between the creditors of the trust fund and the State or Trustees of the Internal Improvement Fund. *Id.*

4. The power of one Legislature is not limited by the act of an antecedent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The Internal Improvement Act is not organic law. *Id.*

5. Bonds issued by railroad companies under the provisions of the act of the Legislature of January 10, 1855, were, under the statute, a first lien or mortgage on the roads, the equipments and franchises

INTERNAL IMPROVEMENT ACT FUND—(*Continued.*)

of the companies issuing them. A sale by the Trustees named in the act having been had and a balance of purchase-money being due, an equitable lien for such balance resulted primarily to the Trustees as the vendors in the sale. A balance of purchase-money being due upon the sale of each road, the right of the vendors is to a sale of each road separately. A sale of both estates for the payment of the aggregate amount of the liens cannot be had. The lien of the Trustees for balance of purchase-money due upon the sale of the Pensacola and Georgia and the Tallahassee Railroads, and the lien of the State as trustee upon the Jacksonville, Pensacola and Mobile Railroad, examined and defined with reference to the parties to this suit. In this case the State admits the existence and priority of the lien of the Trustees. The case of The State of Florida vs. Anderson, *et al.*, 91 U. S., 669, commented upon and followed, so far as applicable to the pleadings and proofs in this case. *State and Trustees* v. *J. P. & M. R. R. Co., et als.*, 708.

6. The Constitution, operative in this State in 1855, made it the duty of the Legislature to designate objects of improvement, which shall constitute a State system. The Legislature in that year, (January 6, 1855,) designated certain improvements as proper objects to be aided from a trust fund created by it and thus establish a system. The primary purpose of this legislation was the construction of the works belonging to the system, not the extension of aid or bounty to the corporations having the right to construct the works so designated. The aid extended by the act was the consideration to the companies, having or to have the right to construct the works, to accept the provisions of the law, thus bringing themselves within the system, subject to its control and regulations. The designation of a road "as a proper improvement to be aided from the fund" created by the act made it an improvement belonging to the system, and the acceptance of the provisions of the law by the company having the right to construct it, gave the company the rights granted. Each road was, under the terms of the law, exempt from taxation during its construction, and for thirty-five years from its completion. This exemption, rested in contract, was attached to the property and could not be subsequently divested by the State. *Gonzales* v. *Sullivan*, 791.

7. During the year 1855 the Legislature designated another line of railroad as a proper improvement to be aided from the Internal Improvement Fund, in the manner provided for in the act establishing the system. This constituted the road a part of the system, and upon the company's acceptance of the provisions of the internal improvement act, the right of exemption from taxation attached to the road. These acts, relating to the same subject-matter, must be construed together as one act. *Id.*

8. The power of one Legislature is not limited by the act of an antece-

INTERNAL IMPROVEMENT ACT FUND—(*Continued.*)

dent one, unless the act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The internal improvement act is not organic law. It was subject to modification by a subsequent Legislature, whenever its power was not thus limited. *Id.*

9. A prior Legislature cannot make the exercise of constitutional power and duty by a subsequent one depend upon the amount of gain which individuals may realize from private investments. *Id.*

JUDGMENTS. See *Bastards and Bastardy*, 2, 7; *Justice of Peace.*

1. A court of record has inherent power to correct the mistakes of its officers, so that its record may speak the truth as to its action. Clerks of the Circuit Court have no authority to enter a judgment after the expiration of the term, upon a verdict rendered in term. Such an entry, though placed in the minutes as being rendered during term, may be inquired into by the court at a subsequent term and if no such judgment was rendered by the court, such entry should be corrected. The corrections may be made upon parol evidence, and the presumption in this court is that there was sufficient to justify the action of the Circuit Court. *Sedgwick* v. *Dawkins*, 198.

2. In a suit commenced by summons, and in which an attachment is issued at the same time, a motion to dissolve the attachment will not prevent the plaintiff entering the defendant's default for not pleading. *Loring* v. *Wittich*, 617.

3. Where a judgment by default for want of a plea is regularly taken, an application to set aside the judgment and allow the defendant to plead is addressed to the sound discretion of the court. *Id.*

4. There cannot be in the same case two inconsistent final judgments covering the same subject-matter against the same defendant, based upon the same pleadings by the same plaintiff. The first judgment covering the subject must stand until it is reversed or opened and vacated. *State and Trustees* v. *J. P. & M. R. R. Co., et al.*, 708.

5. A case should not be remanded with directions to modify a judgment therein made unless the proofs in the record authorize such modification. The existence of *bona fide* purchasers of State bonds is not established by the proofs in this case so as to authorize a final judgment, and this court should not direct any action to be had based upon the existence of such fact. This court is controlled by the record. *Id.*

6. A verdict that "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876," expresses sufficiently the intention of the jury; the time for which such interest is to be computed and the rate are fixed. The Clerk can make the necessary calculation and embody the amount in the judgment. *Simpson & Co.* v. *Daniels*, 677.

JUDGMENTS—(*Continued.*)

7. In a common law case an appeal lies only after a final judgment. *City of St. Augustine* v. *Usina*, 829.

JURISDICTION. *For Chancery Jurisdiction*, see *Practice* (*Equity*,) 4, 5 18, 30, 31.

I. Of the Supreme Court.

1. The Supreme Court has authority to prescribe a rule requiring appellants to give bond, or make a deposit for costs with the clerk. *Robinson* v. *Roberts*, 156.

2. There is no provision of the Constitution or statutes authorizing a review in the Supreme Court, by appeal or writ of error, of a determination by the Circuit Court upon an appeal from a judgment of the county judge in proceedings before him, relating to the unlawful detention of lands and tenements. *Barnett* v. *Togni*, 328.

3. This court has jurisdiction to hear and determine an appeal from a judgment rendered by a Circuit Court in an action brought under the statute in relation to the maintenance of bastard children. *John D. C.* v. *State, ex rel.* 554.

II. Of the Circuit Courts.

1. The Circuit Courts under the Constitution of this State have no power to have a sale by their own officers by virtue of their decree of property in another circuit. Their authority in such cases does not extend beyond establishing the rights and defining the liens of the several parties before them. *State and Trustees I. I. Fund* v. *J. P. & M. R. R. C. et al.*, 708.

2. Notwithstanding an order directing a complaint to be dismissed, if the court has in its possession funds which have accrued from the management of the property, the subject matter of the suit, it may direct payment of claims incurred for the protection and preservation of the property during the action. *State* v. *Fla. Cen. R. R. Co.* 703.

3. The provisions of Sections 43 and 44 of Chapter 2040, Laws of 1875, which authorize the filing of a transcript of the judgment of a Justice of the Peace in the office of the Clerk of the Circuit Court, and the entry of a memorandum of the filing of such transcript in the judgment docket, and the issuing of execution on such judgment by the clerk, are held to be not in conflict with Section 8 of Article VI. of the constitution. The proceeding does not call into action or depend upon the jurisdiction of the Circuit Court. Whether the judgment so docketed becomes "a judgment of the Circuit Court," is a question not necessarily involved, as the statute may be operative without reference to it. *Bucky* v. *Willard*, 330.

4. Whether a Circuit Court has the power to set aside an execution issued by the clerk upon a transcript of a justice's judgment: quere? (See Thom. Dig., 360, Sec. 6). *Id.*

JURISDICTION—(*Continued.*)

III. Of Probate Court or Judge.

1. Judicial power and jurisdiction is not in its nature exclusive. The general rule is that like judicial authority is possessed by different Courts, and a grant of jurisdiction to one Court, even if it be of the same character as that possessed by another, does not repeal the first grant but renders the tribunals in which it is vested Courts of concurrent, not of exclusive, jurisdiction. Applying this principle to the act of 1844, vesting jurisdiction in the Circuit Courts to sell lands belonging to intestate estates to pay debts, it does not repeal an antecedent law vesting a previous like authority in the Judge of Probate. *Hays' Adm'x* v. *McNealy*, 409.

2. Where the jurisdiction and power to hear a case depends upon the existence of a fact, that fact must be alleged or appear, or the proceedings are *coram non judice* and void. The act of 1833, under which the proceedings in this case were had, authorized the Judge of Probate to order a sale of real estate to pay debts *"after exhaustion of personal assets."* This exhaustion was a fact potential for the jurisdiction of the Court. Without it the proceedings were void. *Id.*

3. Under the grant of jurisdiction to the Judge of Probate in the Constitution of 1865, there was no original or inherent power in him to sell lands to pay debts. Lands were not assets until so declared by the Legislature. His power was conditional, is derived from legislative grant, and is a donation of special and limited jurisdiction. *Id.*

IV. General. See *Corporation*, 3; *Practice*, (*Equity*) 12; *Funds in Court.*

JURORS AND JURY. See *Bastards and Bastardy.*

1. The act of the Legislature of A. D. 1877, Chapter 3010, entitled "An act to amend Section 3, Chapter 1628, Laws of Florida, relating to jurors, and repeal Chapter 2043, Laws of Florida, approved February 20, 1875," not only amends and repeals the particular sections specified, but makes further provisions upon matters properly connected with the subject of the acts affected by the amendment and repeal: *Held*, That the subject of the act being expressed in the title of the amending act, the Legislature was not restricted by the Constitution to the mere amendment or repeal so expressed, and it was competent to include in the act other provisions of law upon the same subject and properly connected therewith. *Gibson* v. *State*, 291.

2. An act providing that juries, to be empaneled for the trial of causes, civil or criminal, should be composed of six men, is authorized by the Constitution as amended in 1875. *Id.*

3. A juror after solemnly entering his verdict in court, "is not to be be-

lieved or heard" when he afterwards swears that he never approved or consented to the verdict. After the return and affirmance of a verdict in open court, the testimony of jurors as to the motives and influences by which their deliberations were governed should not be received. *Coker & Scheiffer* v. *Hayes*, 368.

4. Where the conflicts in testimony are of such character as to involve principally questions of credibility, this court will not assume to perform this exclusive function of a jury. Under the modern system, where parties are permitted to testify, the best tribunal to determine how far a man's interest controls him is a jury of the vicinage. An appellate tribunal is least of all fitted for such a function. *Id.*

5. The affidavit of a party based upon information and belief derived from statements of members of a jury as to their conduct in the jury room, is entitled to no more or other weight than the affidavit of a juror himself; it must stand on the same footing. *Id.*

6. When it is alleged as error that certain undue influences were brought to bear upon some members of the jury to prejudice or mislead them, or to influence them to find for a party, the misconduct or irregularity so complained of upon the part of the party or the jurors, must be satisfactorily proven. *Coker* v. *Merritt's Ex'r*, 416.

7. A verdict will not be set aside when the evidence is conflicting, unless it is apparent that the jury have been actuated by some improper motive. *Id.*

8. The court, in the exercise of a sound discretion, has a right to excuse a juror, although he may be found competent to serve; and such an exercise of discretion is no error, although objected to by the parties to the action. *John D. C.* v. *State, ex rel.*, 554.

9. Under section 28 of "An act relating to jurors," approved August 1, 1868, the court is to determine the necessity of a view by the jury of the "premises or place in question," and having exercised a sound discretion in denying a motion for such view, this court will not interfere. *Coker* v. *Merritt's Ex'r*, 416.

10. A verdict, "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876," expresses sufficiently the intention of the jury; the time for which such interest is to be computed and the rate are fixed. The clerk can make the necessary calculation and embody the amount in the judgment. *Simpson & Co.* v. *Daniels*, 677.

11. In 1876 there was no statute making a bill incurred for the board of jurors engaged in the trial of a capital felony a charge against the county in which the trial happened, nor was the board of bailiffs in whose charge such jurors were a charge against the county. *County of Nassau* v. *Downie*, 171.

JUSTICE OF PEACE. See *Habeas Corpus, Criminal Law*, 1, 2, 5.

The provisions of sections 43 and 44 of chapter 2040, laws of 1875, which authorize the filing of a transcript of the judgment of a Justice of the Peace in the office of the clerk of the Circuit Court, and the entry of a memorandum of the filing of such transcript in the judgment docket, and the issuing of execution on such judgment by the clerk, are held to be not in conflict with section 8 of article VI. of the Constitution. The proceeding does not call into action or depend upon the jurisdiction of the Circuit Court. Whether the judgment so docketed becomes "a judgment of the Circuit Court," is a question not necessarily involved, as the statute may be operative without reference to it. *Bucky* v. *Willard*, 330.

LACHES. See *Principal and Sureties*, 4; *Pleading*, 14.

LANDS AND ESTATES IN LAND. See *Administrators and Executors, Ejectment, Husband and Wife, Lessor and Lessee, Mortgage, Statute of Frauds, Unlawful Detainer.*

LEGISLATIVE POWER. See *Constitutional Law*, 18, 19.

LESSOR AND LESSEE.

It is the duty of an under-lessee to inform himself of the covenants contained in the original lease, for, if he enter and take possession, he will be bound by these covenants. Where the restriction upon the manner of using the premises is a covenant running with the land, it is binding upon the estate in the hands of a sub-tenant. He takes the title of the lessee with like limitations and restrictions. *Dunn* v. *Barton & Haselton*, 765.

LIEN. See *Internal Imp. Act and Fund*, 5.

MANDAMUS. See *Collector of Revenue*, 1.

1. Whether a vote cast at an election was legally cast, or whether an election held on the day appointed of which due return is made to the Board of State Canvassers was a legal election, are judicial questions which the Board of State Canvassers of elections cannot determine. The general power and duty of this Board is to ascertain and declare who received the majority of the votes cast. This is a ministerial duty, and its exercise may be controlled by mandamus. *State ex rel.* v. *Board of State Canvassers*, 17.

2. There is strictly no return to a peremptory writ of mandamus. It is to be obeyed. A certificate showing in general terms a performance of the several specific acts commanded to be done, is the proper response to such writs. All other matter is surplusage and should be stricken out. *Id.*

3. Where acts admitted to be done by the answer of respondents in a proceeding by mandamus disclose erroneous action and a failure to discharge a ministerial duty imposed by law, and a consequent

MANDAMUS—(*Continued.*)

violation of right, this court has power to order a Board of State Canvassers to reassemble and discharge their duty. *Id.*

4. Where, in a proceeding by mandamus, the question of the jurisdiction of the court has been heard and determined, a protest against the jurisdiction interpolated in the certificate of obedience to the peremptory writ should be stricken out. Having determined that we have jurisdiction, it is our duty to enforce our order, and that question cannot be thus again raised. *Id.*

5. Where a canvass for votes cast for persons at an election for the office of Governor of this State is commanded by a peremptory writ, a return showing a canvass of votes cast for other officers is surplusage, which the court of its own motion should strike out. *Id.*

MARRIED WOMEN. See *Husband and Wife.*

MASTER IN CHANCERY.

Five dollars per day is not an exorbitant or unusual allowance for the services of an accurate, competent and industrious accountant and master. The Circuit Court having found the time employed, and there being no satisfactory testimony to the contrary, this court must approve such finding. It is the duty of the judge to see that he does not allow for more labor than has been properly performed. *Chandler* v. *Sherman*, 99.

MISTAKES. See *Records of Court.*

MORTGAGE.

1. A deed to land is in the name of, and recites a consideration from B. A., who is not the grantor in the deed, seeks, by parol testimony, to establish that the consideration for the land was money from which B. had loaned him, and that the deed was a surety for this debt. In such a case, where there is a positive denial in the answer, the clearest and strongest testimony must be produced to establish the loan. *Matthews* v. *Porter*, 466.

2. A mortgagee seeking the foreclosure of a mortgage can have only such debts established as are within the terms of the mortgage. *Tunno and Jessup & Co.* v. *Roberts*, 738.

3. Where, in a foreclosure suit, the defence is a satisfaction of a mortgage debt, and the evidence in the case upon the part of the plaintiff consists of the debt established by judicial proceedings and outstanding up to the institution of the suit, the mortgage, and plaintiff's denial of any payment or satisfaction, and the evidence upon the part of the defendant is his own testimony in direct conflict with this written evidence and the testimony of the plaintiff, the testimony of defendant's son, which is uncertain and indefinite, and to part only of a conversation between the parties, and the testimony of a third party not plainly in conflict with plaintiff's testimony, the court should find for the plaintiff. Especially is this true when the assault upon the mortgage debt

MORTGAGE—(*Continued.*)

involves the regularity and propriety of proceedings in a collateral suit. Under the peculiar circumstances of this case the decree is affirmed without prejudice to any right to proceedings which the defendant may have, looking to re-sale of the property alleged to have been sold by the fraud and covin of the plaintiff at a price less than its value, or to file an original bill to set the sale aside, or to his action for damages. *Finlayson* v. *Lipscomb*, 751.

4. Where, upon a foreclosure of mortgage, after decree and sale it is found that a portion of the lands described in the mortgage (a copy of which was annexed to the bill) were not properly described in the bill of foreclosure, a bill of review may be filed for the purpose of correcting the error in the bill and setting aside the decree and sale as to the land erroneously described; or setting aside the decree in *toto* if necessary, and obtaining a sale of the mortgaged lands. *Thompson* v. *Maxwell*, 773.

5. A mortgagee cannot restrain the prosecution of a suit in ejectment (brought by a purchaser under a junior lien) against the mortgagor or his tenant. *Id.*

6. A mortgage unrecorded or imperfectly recorded is valid as against creditors or subsequent purchasers with notice of the mortgage. *Id.*

7. Where parties holding a deed executed for the purpose of securing them for money due and advances to be made, and they on delivery of the deed gave to the grantor an agreement to convey to the grantor, on payment of a sum named, the interest of the grantees is a mortgage interest; and if they have taken possession of the premises against the consent of the grantor, and without foreclosure, his proper remedy against them is at law, and not in equity, to recover the possession. *Endell & Son* v. *Walls*, 786.

8. The fact that complainant's property was taken possession of by a mortgagee without foreclosure, while complainant was in custody of a committee as an adjudged lunatic, does not give him, after the restoration of his reason, a right to recover possession of his land by bill in chancery. *Id.*

MOTION IN ARREST OF JUDGMENT. See *Arrest of Judgment.*

MOTION FOR NEW TRIAL. See *New Trial, Arrest of Judgment.*

MULTIFARIOUSNESS. See *Pleading*, 9.

NEWLY DISCOVERED EVIDENCE. See *Evidence.*

NEW TRIAL. See *Arrest of Judgment.*

1. The entry of the grounds of a motion for new trial upon the motion docket, is a filing of the reasons for such motion with the Clerk as required by the statute. *Dupuis* v. *Thompson*, 69.

2. The rules of practice of the Circuit Court require notice of a motion

NEW TRIAL—(*Continued.*)

for new trial, and where the party fails to give such notice, the court may properly refuse to consider the motion. *Id.*

3. A motion for new trial is not a waiver of exceptions, and if for any reason such motion cannot be considered in this court, and the exceptions during the trial are properly embodied in the record, we can review the rulings of the Circuit Court in this respect. As to this matter the case then stands substantially in the same attitude that it would have been before the statute authorizing a review by this court of the rulings of the Circuit Court upon a motion for new trial. *Id.*

4. The Court will not set aside the verdict of a jury upon questions of fact, where there is a conflict of evidence, unless it may well be assumed from the circumstances of the case that some improper influence has been brought to bear to affect such jury contrary to the right. *Nichols & Gautier* v. *Mooring*, 76.

5. The court will not reverse a judgment simply for the reason that immaterial evidence was introduced on the trial. It must appear that such evidence was legally prejudicial to the parties' rights, or calculated to have an injurious influence upon the minds of the jury, and to mislead them in their endeavors to arrive at a correct conclusion. *Id.*

6. L. entered into an agreement with A. and K. to form a mercantile partnership, and before perfecting their articles or paying up the capital stock, they purchased goods and other property in the contemplated firm name of "A. K. & Co." The terms of the partnership agreement not being complied with by L., the enterprise was abandoned, and afterwards A. & K. formed a partnership with one Campbell, under the name of "A. K. & Campbell," who took the goods previously purchased by "A. K. & Co" and paid them and employed L. as their clerk and assistant. L. now sues "A. K. & Campbell" for his services as clerk, and for his services and expenses in going to New York and purchasing the goods which were bought in the name of "A. K. & Co." before the firm of "A. K. & Campbell" was formed or contemplated, no promise or agreement to pay for such services or expenses by "A. K. & Campbell" being alleged or proved, except as to the charge for services as clerk. The judge charged the jury that the latter firm was not liable for plaintiff's services in behalf of "A. K. & Co.," but the jury brought in a verdict covering plaintiff's services and expenses in the purchase of goods for the contemplated firm of "A. K. & Co." of which he was a part: *Held*, that the verdict was against the evidence, contrary to law and to the charge of the court, and should be set aside and a new trial granted. *Alvord, Kellogg & Campbell* v. *Little*, 158.

7. Where the verdict of the jury is plainly against testimony, as to which there is no question of credibility, a new trial should be awarded. Hence, in an action of ejectment, under our statute, where there is

NEW TRIAL—(*Continued.*)

no question as to the allowance of mesne profits, and where the value is fixed by the testimony, the jury must find some damages. *Duncan, et al.*, v. *Jackson, et als.*, 338.

8. A juror, after solemnly entering his verdict in court, "is not to be believed or heard" when he afterwards swears that he never approved or consented to the verdict. After the return and affirmance of a verdict in open court, the testimony of jurors as to the motives and influences by which their deliberations were governed should not be received. *Coker & Scheiffer* v. *Hayes*, 368.

9. Facts alleged in support of a motion for new trial on the ground of surprise, must at least be sworn to, or supported by authentic documentary evidence showing merits. The mere statement of a party is never sufficient. *Id.*

10. A new trial should not be granted upon proof of declarations made by a juror relating to the deliberations of the jury. *Godwin* v. *Bryan*, 396.

11. Where the verdict of a jury is contrary to the law of the case, as applied to the facts admitted and as to which no question of credibility is involved, verdict must be set aside. *Hayes' Adm'x* v. *McNealy*, 409.

12. To authorize a court to grant a new trial upon the ground of newly discovered evidence, the party must show that the evidence has come to his knowledge since the trial; that it is not through the want of diligence that it did not come to his knowledge sooner, and that it is not cumulative, but relates to facts upon which there was, on his part, no evidence on the trial complained of. *Coker* v. *Merritt's Ex'r*, 416.

13. The court will not reverse the finding of a jury upon a question of fact, unless the verdict is so clearly and manifestly against the weight of evidence as to suggest the presumption that it was produced by influences other than a proper consideration of the testimony. *John D. C.* v. *State, ex rel.*, 554.

14. It is the province of the jury to determine questions of fact, and when the evidence is conflicting and there is no question of credibility of witnesses, this court will not interfere unless it appears that the jury were influenced by some improper motive. *Mayo* v. *Hynote*, 673.

15. Where a question of fact is determined and settled by a jury, upon conflicting evidence, and there is no charge or suggestion of undue influence upon, or improper motives affecting the jury, this court will not reverse the finding. *Forcheimer & Co.* v. *Mayo*, 676.

16. The court will not reverse a judgment founded on the verdict of a jury for the sole reason that immaterial evidence was admitted by the court, when it is apparent that such evidence could not have influenced the jury in forming their verdict. *Simpson & Co.* v. *Daniels*, 677.

17. A party applying for a new trial upon the ground of newly-discovered

NEW TRIAL—(*Continued.*)

evidence "must make this vigilance apparent," and the evidence so sought to be introduced must not be cumulative. *Id.*

NON-CLAIM—STATUTE OF. See *Statute of Limitations*, 5, 6, 7, 8.

NOTICE. See *Mortgage*, 6; *New Trial*, 2.

OBTAINING GOODS UNDER FALSE PRETENCES. See *Criminal Law*, 3.

OCCUPYING CLAIMANTS—STATUTE AS TO, CONSTRUED. See *Ejectment*, 5.

OFFICE AND OFFICER. See *Collector of Revenue, Records of Court.*

1. The rule requiring that the judge presiding at the trial shall settle the case on exceptions, does not control where, at the time the case is to be settled, such judge has resigned. Public duties, upon which depend private rights, do not pass away with the official existence of the judge resigning, and the duty of settling a case on exceptions devolves upon his successor. In exercising such power this court must presume that he acted upon reliable information. *Hays' Adm'x* v. *McNealy*, 406.

2. The legal presumption is that an officer does his duty when acting under a general power, such as a sale under *fi. fa.* A party claiming under a sheriff's deed of this character, need not prove the advertisement when he puts in evidence the judgment, the execution, the levy, the return of the sheriff, and his deed reciting due and legal advertisement and sale. *Dupuis* v. *Thompson*, 69.

3. A pilot is not an officer within the meaning of the Constitution and Statutes of this State; he is a person invested by law with peculiar powers and privileges connected with commerce, for the exercise of which a qualification is required by the State. The privileges and powers which he has, being of a public nature, resulting from legislative grant, are franchises. If he is exercising such franchises without the qualification prescribed by the State, an information in the nature of a *quo warranto* may be brought by the Attorney-General. *State, ex rel.*, v. *Jones*, 306.

4. Two years actual service on a pilot-boat on the bar of Pensacola as an able seaman, receiving during that time instructions from pilots relative to the harbor, the bar, depth of water, courses, and the management of vessels, constitutes an apprenticeship within the meaning of the statutes of this State controlling the subject. An actual binding out is not necessary. *Id.*

5. Where the time for which an officer is to be held is fixed by the Constitution, and there is no provision other than that this appointee shall hold for the full term, the fact that a former incumbent did not hold the office for the full term for which he was appointed does not affect the term of a subsequent constitutional appointee. The rule is that where the term of office is fixed by the Constitu-

OFFICE AND OFFICER—(*Continued.*)

tion, each succeeding incumbent, appointed in accordance with the Constitution, holds the office for the full period. *Advisory Opinion*, 841.

6. In 1876 there was no statute making a bill incurred for the board of jurors engaged in the trial of a capital felony a charge against the county in which the trial happened, nor was the board of bailiffs in whose charge such jurors were a charge against the county. *County of Nassau* v. *Downie*, 171.

7. In order to constitute a charge against a county, the thing for which it was incurred must be authorized by law. No officer can bind either the State or county, unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced. *Id.*

PAROL CONTRACTS FOR SALE OF LANDS. See *Statute of Frauds.*

PARTIES. See *Writ of Error*, 1.

1. A sheriff, who is a party defendant to a bill filed for the purpose of enjoining proceedings instituted to exempt personal property from levy and sale, and to subject such property sale, and having no interest in the result, is not a necessary party to an appeal from a decree subjecting such property to levy and sale. *Loring* v. *Wittich*, 495.

2. Where it is charged in the bill filed for the purpose of subjecting certain land to sale under an execution against M., that the property had been purchased by M. of one S., who had conveyed it to B. in trust for and at the instance of M., in fraud of the judgment creditor, but no privity is charged against S.: *Held*, That S. is not a necessary party to the suit. *McDonald* v. *Russell*, 260.

3. Where there is a total absence of parties against whom a decree can be made, a plea in abatement should be sustained. *Wilson's Adm'r, et al.* v. *Dibble*, 782.

4. The wife's separate estate is an equitable estate, where the legal title is vested in some other person for her benefit, and the trustee is a necessary party to a suit seeking to charge such estate. *Dollner, Potter & Co.* v. *Snow, et als.*, 86.

PARTNERS AND PARTNERSHIP.

1. Where there is no agreement to the contrary, and no fraud or collusion, each copartner has the right to settle demands due to, and give receipts to bind, the firm, even after the dissolution of such partnership. *Nickels & Gautier* v. *Mooring*, 76.

2. It is the duty of a partner, to whom is entrusted the management of the books, to keep precise and accurate accounts of all his transactions for the firm. He should have the books always ready for inspection and examination, and his conduct should be consistent with fair dealing and good faith. *Chandler* v. *Sherman*, 99.

3. One partner may exercise such powers and make such contracts as are

appropriate to the business in which the parties are engaged, and within the customs and commercial practice thereto appertaining. A contract clearly beyond such powers, customs and commercial practice, cannot be sustained as against the firm, unless it is made with the consent of the other partner. Hence, where the aggregate amount of the capital contributed by two partners is the sum of $16,000—one contributing $9,000, the other $7,000—neither partner has authority, without the assent of the other, to borrow the sum of $2000 from a third party, agreeing to pay therefor twenty-five per cent. of the net profits of the concern. Where, in such case, the one partner avers the assent of the other, he is held to strict proof the same. *Id.*

4. Two partners agree that either of them may take a certain proportion of the property, within a fixed time, at a certain valuation. This contract being executed by one of the parties taking possession within the time fixed, the other cannot insist upon the price which the partner taking the property received for it from a third party. He is restricted to the agreement. *Id.*

5. Where the firm has purchased the interest of a third partner, and has paid a large proportion of the purchase-money, the managing partner of the concern cannot, without the assent of the other partner, debit himself in the accounts of the new firm with its debt to the retiring partner, and claim a proportionate share of the assets of the old firm. The balance of the debt to the retiring partner is a debt of the new firm, and the account must be so stated. Even if the retiring partner has accepted the managing partner as his exclusive debtor for the balance, the managing partner would be entitled to nothing more than such credit as would follow the payment of an ordinary debt of the new concern. *Id.*

6. In the absence of a special agreement, one partner's accounts with the firm cannot be charged directly against his contribution to the capital, the other partner's individual account being charged up in his general account with the firm. The same rule must control in each case. The proper rule is to charge each sum in the individual account with the firm. *Id.*

7. Where neither partner is blameless, the costs should be divided among the parties in a suit for dissolution and an account. *Id.*

8. A purchase by a managing partner, engaged in carrying on the business of a copartnership established for the purpose of running a sawmill, of a quantity of chopped corn, the partner ordering it representing that it is required for the business of the firm, and proof that the corn was actually used in the business of the firm, is sufficient to establish the presumption that the purchase was made in the regular course of the partnership business, and to charge the partners with the indebtedness. *Tate* v. *Clements*, 339.

9. A promise by a member of a late copartnership, made after dissolu-

PARTNERS AND PARTNERSHIP—(*Continued.*)

tion and before a suit is barred by the statute of limitations, to pay a partnership debt, will not prevent the running of the statute so as to estop the other partner from availing himself of the defense of the statute as against the original cause of action; and this whether the creditor was aware of the dissolution or not. *Id.*

10. Nor does an admission by one partner, after dissolution, that a debt is due, bind the other late partner so as to take the case out of the statute as to the latter. *Id.*

11. The "cause of action" in a suit for goods sold is the express or implied promise to pay, and a promise by the party sought to be charged, or facts from which a promise legally results, within the period of the statute of limitations, must be shown to defeat the operation of the statute. *Id.*

12. A member of a copartnership, after the dissolution, has no agency growing out of the former partnership relation to create or to perpetuate a liability of his late copartner for partnership indebtedness, as against the operation of the statute of limitations. *Id.*

13. L. entered into an agreement with A. and K. to form a mercantile partnership, and before perfecting their articles or paying up the capital stock, they purchased goods and other property in the contemplated firm name of "A. K. & Co." The terms of the partnership agreement not being complied with by L., the enterprise was abandoned, and afterwards A. & K. formed a partnership with one Campbell, under the name of "A. K. & Campbell," who took the goods previously purchased by "A. K. & Co." and paid for them, and employed L. as their clerk and assistant. L. now sues "A. K. & Campbell" for his services as clerk, and for his services and expenses in going to New York and purchasing the goods which were bought in the name of "A. K. & Co." before the firm of "A. K. & Campbell" was formed or contemplated, no promise or agreement to pay for such services or expenses by "A. K. & Campbell" being alleged or proved, except as to the charge for services as clerk. The judge charged the jury that the latter firm was not liable for plaintiff's services in behalf of "A. K. & Co.," but the jury brought in a verdict covering plaintiff's services and expenses in the purchase of goods for the contemplated firm of "A. K. & Co." of which he was a part: *Held*, That the verdict was against the evidence, contrary to law and to the charge of the court, and should be set aside and a new trial granted. *Alvord, Kellogg & Campbell* v. *Little*, 158.

PENALTY. See *Constitutional Law*, 7.

PILOTS. See *Officer*, 3, 4; *Quo Warranto*, 1, 2.

PLEADING.

1. COMMON LAW. See *Practice, (Law)* 5; *Quo Warranto*, 2.

1. A demurrer to pleas reaches the declaration, notwithstanding a pre-

PLEADING—(*Continued.*)

vious demurrer to the declaration overruled. Where a party pleads over after demurrer overruled, the demurrer is waived, and, in contemplation of law, ceases to be a part of the record. *Johnson* v. *Pen. & Per. R.R. Co.*, 623.

2. After judgment by default, the court may allow the plaintiff to amend the record and proceedings, during the same term, but such amendment, unless it affects a substantial right of the defendant, does not give him a right to demand that the judgment be set aside. *Loring* v. *Wittich*, 617.

II. CODE.

3. Where there is an entire failure to state facts sufficient to constitute a cause of action, in a complaint under the Code, a failure to demur is not a waiver of such defect, but advantage can be taken of it at any stage of the cause. *Myrick* v. *Pittman's Adm'r*, 692.

4. The wife's *separate estate* is an equitable estate where the legal title is vested in some other person for her benefit, and the trustee is a necessary party to a suit seeking to charge such estate. *Dollner, Potter & Co.* v. *Snow, et als.*, 86.

5. In such case the complainant must set up the nature of the trust, and show that such a charge is consistent with and conformable to the law of the trust as disclosed by the deed or settlement which created it. *Id.*

III. EQUITY. See *Parties; Exemption of Property from Forced Sale*, 1.

6. A general demurrer to a bill, as for want of equity, will be overruled if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer. *Thompson* v. *Maxwell*, 773.

7. Where there is a plea and an answer in support thereof, the answer cannot be regarded as a defence independent of the plea. When such a plea is set down for argument, the matter of the answer should be considered in connection with the plea, and an order overruling the plea disposes of the plea and answer. *Hart* v. *Sanderson's Adm'rs*, 264.

8. Where in such case the court, in disposing of the plea, confines itself to the consideration of the formal plea, independent of the answer in support thereof, it is error. *Id.*

9. After the plea is overruled in such case, it is error to set the cause down for hearing upon the bill and the answer in support of the plea. *Id.*

10. The recital in a bill brought by an assignee to recover assets which passed under the assignment, that he is also a creditor of the insolvent debtor, does not render the bill multifarious. *Keyser, Judah & Co.* v. *Simmons, et als.*, 268.

11. A cross bill is a pleading which necessarily precedes a final decree. Up to the hearing it is proper for the court upon proper showing under oath to permit such a bill to be filed. It is proper so to do when

PLEADING—(*Continued.*)

it appears that the suit as instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of the parties. *Finlayson* v. *Lipscomb*, 751.

12. Where there is a total absence of parties against whom a decree can be made, a plea in abatement should be sustained. *Wilson, et al.*, v. *Dibble*, 782.

13. It is not a good answer to a creditor's bill that the liability of one of the defendants as a special partner was limited by the articles of co-partnership. Such plea should be made, if at all, when the original suit was brought. The judgment fixed the liability. *Loring* v. *Dunning & Palmer, et als.*, 119.

14. Where, upon a foreclosure of mortgage, after decree and sale it is found that a portion of the lands described in the mortgage (a copy of which was annexed to the bill) were not properly described in the bill of foreclosure, a bill of review may be filed for the purpose of correcting the error in the bill and setting aside the decree and sale as to the land erroneously described; or setting aside the decree in *toto* if necessary, and obtaining a sale of the mortgaged lands. *Thompson* v. *Maxwell*, 773.

15. Leave to file a supplemental bill in the nature of a bill of review should not be granted in a case where it is apparent that for months before publication and hearing, a reasonable degree of diligence on the part of the party would have resulted in his ascertaining the new evidence proposed to be brought forward. Where the new evidence appears to be the testimony of named witnesses and the other requirements of the law are complied with, the petition should be accompanied by the affidavits of such persons to the new facts alleged, or some good reason be given why they were not produced. Some of the cases upon the subject of leave to file a supplemental bill in the nature of a bill of review considered. *Finlayson* v. *Libscomb*, 751.

PRACTICE. (For APPELLATE PRACTICE see *Appellate Practice.*)

I. LAW. (Including Code cases of a Legal Nature), see *Bastards and Bastardy.*

1. There is strictly no return to a peremptory writ of mandamus. It is to be obeyed. A certificate showing in general terms a performance of the several specific acts commanded to be done, is the proper response to such writs. All other matter is surplusage and should be stricken out. *State, ex rel.* v. *Board of State Canvassers*, 17.

2. Under the statute, the proper and only place for the filing of the original certificate of a canvass by the Board of State Canvassers of the votes cast at a general election for Governor in this State, is the office of the Secretary of State. Where such an original certificate is filed in this court as a response to a peremptory writ commanding a canvass, this court should direct its return to its only proper legal place of deposit. While it is the duty of this court to compel the

PRACTICE—(*Continued.*)

Board of State Canvassers to perform their duties, still the canvass made by them under our order is their canvass. This court is not a board of State Canvassers. *Id.*

3. Where, in a proceeding by mandamus, the question of the jurisdiction of the court has been heard and determined, a protest against the jurisdiction interpolated in the certificate of obedience to the peremptory writ should be stricken out. Having determined that we have jurisdiction, it is our duty to enforce our order, and that question cannot be thus again raised. *Id.*

4. Where a canvass for votes cast for persons at an election for the office of Governor of this State is commanded by a peremptory writ, a response showing a canvass of votes cast for other officers is surplusage, which the court of its own motion should strike out. *Id.*

5. Pleading over after judgment upon demurrer, and taking issue upon or replying to the pleading, is a waiver of the demurrer. *Dupuis* v. *Thompson*, 69.

6. The entry of the grounds of a motion for new trial upon the motion docket, is a filing of the reasons for such motion with the Clerk as required by the statute. *Id.*

7. The rules of practice of the Circuit Court require notice of a motion for new trial, and where the party fails to give such notice, the court may properly refuse to consider the motion. *Id.*

8. A motion for new trial is not a waiver of exceptions, and if for any reason such motion cannot be considered in this court, and the exceptions during the trial are properly embodied in the record, we can review the rulings of the Circuit Court in this respect. As to this matter the case then stands substantially in the same attitude that it would have been before the statute authorizing a review by this court of the rulings of the Circuit Court upon a motion for new trial. *Id.*

9. After a deed has been offered and read in evidence to the jury without objection, and the party offering it in evidence has closed, it is too late to insist upon the formal proof of its execution. *Id.*

10. Where a charge embraces several distinct propositions, a general exception to the charge is not available if any one of the propositions is correct. *Id.*

11. The legal presumption is that an officer does his duty when acting under a general power, such as a sale under *fi. fa.* A party claiming under a sheriff's deed of this character, need not prove the advertisment when he puts in evidence the judgment, the execution, the levy, the return of the sheriff, and his deed reciting due and legal advertisement and sale. *Id.*

12. The Court will not set aside the verdict of a jury upon questions of fact, where there is a conflict of evidence, unless it may well be assumed from the circumstances of the case that some improper in-

PRACTICE—(*Continued.*)

fluence has been brought to bear to affect such jury contrary to the right. *Nickels and Gautier* v. *Mooring*, 76.

13. The court will not reverse a judgment simply for the reason that immaterial evidence was introduced on the trial. It must appear that such evidence was legally prejudicial to the parties' rights, or calculated to have an injurious influence upon the minds of the jury, and to mislead them in their endeavors to arrive at a correct conclusion. *Id.*

14. It is not necessary that the court in charging the jury, as requested by counsel, should use the language of the counsel in announcing legal propositions; and when the Court has already instructed the jury upon a question, it is not error to refuse to repeat the matter so charged, however correct the proposition may be. *Id.*

15. Franchises which are incorporeal hereditaments of an intangible nature, are not embraced within the meaning of the terms "lands or tenements" in the act regulating the proceeding of unlawful detainer. *Hence*: *Gibbs, et al.* v. *Drew*, 147.

16. A railroad being a public work, the possession of which is necessarily attended by the right and duty to use and employ the franchises granted by the sovereign in connection with it, an action of unlawful detainer does not lie to recover possession of a part thereof, as this involves the right to and the public duty of exercising these franchises. *Id.*

17. Heirs at law are not proper plaintiffs in an action for unlawful detainer, where defendant is in possession under a lease made by the ancestor in her life-time. The right of possession and consequently the right of action passes to the administrator or executor as an incident of the asset. *Scott* v. *Lloyd, et ux.*, 151.

18. The trial of the issues of fact upon the traverse of the affiadavit upon which a writ of attachment was issued, if a jury be demanded, must be had in the county where the suit is pending. *Canova* v. *Colby & Gould*, 167.

19. *Semble*: That the affirmative of the issues of fact upon such traverse is with the plaintiff; he must prove the truth of the allegation in the affidavit, to the satisfaction of the court or jury, in order to sustain his writ. *Id.*

20. A motion in arrest of judgment made at one term cannot (under the statutes of this State), be changed by amendment, or otherwise, at a subsequent term into a motion for a new trial. *Sedgwick* v. *Dawkins*, 198.

21. A court of record has inherent power to correct the mistakes of its officers, so that its record may speak the truth as to its action. Clerks of the Circuit Court have no authority to enter a judgment, after the expiration of the term, upon a verdict rendered in term. Such an entry, though placed in the minutes as being rendered during the term, may be inquired into by the court at a subsequent term,

and if no such judgment was rendered by the court, such entry should be corrected. The corrections may be made upon parol evidence, and the presumption in this court is that there was sufficient to justify the action of the Circuit Court. *Id.*

22. Under the statutes of this State, certain occupying claimants, after judgment of eviction against them, may have the value of their improvements assessed by a jury in a particular manner and under a special charge. This and other provisions of the statute are of such character that the value of the improvements cannot be set off before judgment against the mesne profits recoverable as damages in the action of ejectment. *Duncan, et al.* v. *Jackson, et als.*, 338.

23. It is the rule of the Code, as well as of the common law practice, that a party cannot, during the progress of the trial, rely with confidence on the strength of his case, take no exception to matters as they occur, or to the charge of the court as given, and afterwards claim the right, either through a motion for a new trial or otherwise, to have matter already acquiesced in and accepted by him reviewed in an appellate court. *Coker and Scheiffer* v. *Hayes*, 368.

24. A simple objection to a question when asked, without an exception to the ruling if the objection is overruled, presents a case of abandonment of the objection. To make such a point available, it is necessary that an exception should be distinctly taken, and placed upon the record. *Id.*

25. A leading question should be permitted only when it appears essential to justice; where a witness is persistently unwilling, or biased, or there exists some like reason, the court should allow it. In some cases a party may and should be permitted to lead his own witness. This matter, however, is in the discretion of the court. It is not ground of error, and Appellate Courts universally refuse to review such exercise of discretion. *Id.*

26. After a witness has been examined in chief, and is recalled in rebuttal, the court may, very properly, prevent a simple repetition of his testimony. A party after his examination of a witness, and after closing his testimony, has no absolute right to recall this witness to establish matters not in rebuttal. Whether this rule ought to be varied is a question for the Circuit Court, and an Appellate Court, if it interferes at all, should only do so where it sees that injustice has been done through this action. *Id.*

27. Questions leading to testimony apparently not pertinent to any issue are properly overruled. *Id.*

28. Where, upon the face of the record, a question clearly open to the objection that it is leading and suggestive is rejected, and no ground for its rejection appears upon the record, the action of the court must be attributed to this cause, notwithstanding the fact that the inquiry was as to matters properly admissible in rebuttal of antecedent testimony. *Id.*

PRACTICE—(*Continued.*)

29. Where the trial is by jury, the charge of the court must be excepted to when given. Such is the rule when the bill of exceptions is framed under the statute of Westminister II., and such is the rule under the Code. *Id.*

30. Where the conflicts in testimony are of such character as to involve principally questions of credibility, this court will not assume to perform this exclusive function of a jury. Under the modern system, where parties are permitted to testify, the best tribunal to determine how far a man's interest controls him is a jury of the vicinage. An appellate tribunal is least of all fitted for such a function. *Id.*

31. Facts alleged in support of a motion for new trial on the ground of surprise, must at least be sworn to, or supported by authentic documentary evidence showing merits. The mere statement of a party is never sufficient. *Id.*

32. Exceptions to the decision of the Court upon a motion for a new trial, are of no avail so far as they relate to rulings of the Judge upon the trial of a cause, if such rulings were not excepted to during the trial. This rule prevails as well in cases which arose under the Code as under the former and the present practice in this State. *Godwin* v. *Bryan*, 396.

33. The time for serving and settling exceptions, under the Code, may be enlarged by the Court or Judge. *Pittman's Adm'r* v. *Myrick*, 401.

34. Under section 28 of "An act relating to jurors," approved August 1, 1868, the court is to determine the necessity of a view by the jury of "the premises or place in question," and having exercised a sound discretion in denying a motion for such view, this court will not interfere. *Coker* v. *Meritt's Ex'r*, 416.

35. In claiming the exemption of personal property levied upon by the sheriff, the only fact necessary to be sworn to under Section 7, Chapter 1715, Laws of 1869, is that the inventory "contains a true and perfect list of all his personal property." *Loring* v. *Wittich*, 498.

36. In a suit commenced by summons, and in which an attachment is issued at the same time, a motion to dissolve the attachment will not prevent the plaintiff entering the defendant's default for not pleading. *Loring* v. *Wittich*, 617.

37. Where a judgment by default for want of a plea is regularly taken, an application to set aside the judgment and allow the defendant to plead is addressed to the sound discretion of the court. *Id.*

38. After judgment by default, the court may allow the plaintiff to amend the record and proceedings, during the same term, but such amendment, unless it affects a substantial right of the defendant, does not give him a right to demand that the judgment be set aside. *Id.*

39. A demurrer to pleas reaches the declaration, notwithstanding a pre-

PRACTICE—(*Continued.*)

vious demurrer to the declaration overruled. Where a party pleads over after demurrer overruled, the demurrer is waived, and, in contemplation of law, ceases to be a part of the record. *Johnson* v. *Pen. & Per. R. R. Co.*, 623.

40. A verdict that "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876," expresses sufficiently the intention of the jury; the time for which such interest is to be computed and the rate are fixed. The clerk can make the necessary calculation and embody the amount in the judgment. *Simpson & Co.* v. *Daniels*, 677.

41. The court will not reverse a judgment founded on the verdict of a jury for the sole reason that immaterial evidence was admitted by the court, when it is apparent that such evidence could not have influenced the jury in forming their verdict. *Id.*

42. A cause will not be remanded simply for the reason that there is a small excess in the amount of damages awarded by the verdict. The jurors are the proper judges from the evidence as to the amount to be awarded, and where the evidence will uphold the verdict, this court will not interfere. *Id.*

43. D. brought his action against S. to recover damage sustained by reason of S's. negligence to one hundred and one pieces of hewn timber. On the trial it appeared that one D. S. was jointly interested with the plaintiff in twenty-one pieces, and that P. was also jointly interested with plaintiff in thirty-two pieces. The jury found for the plaintiff and assessed his damages as sustained on the whole one hundred and one pieces. The defendant S. moved for a new trial, and the plaintiff D. having, before judgment, remitted the average damages on the fifty-three pieces in which D. S. and P. were interested, the motion was denied, and judgment ordered for an amount equal to the average of the damage sustained by the plaintiff D. on the timber owned by him alone: *Held*, To be no error, the evidence showing the timber to be of like quality and value, and the damage having been calculated and arrived at by an average of the whole. *Id.*

44. Where there is an entire failure to state facts sufficient to constitute a cause of action, in a complaint under the Code, a failure to demur is not a waiver of such defect, but advantage can be taken of it at any stage of the cause. *Pittman's Adm'r* v. *Myrick*, 692.

45. In a prosecution under the statute for the maintenance of bastard children, the complaint should allege that the mother is a single or unmarried woman. *Andrew G.* v. *Catherine A.*, 830.

46. Such a prosecution must be in the name of the State. *Id.*

47. A denial by the court of the defendant's right to plead any pertinent matter of law or fact in avoidance of or in answer to the complaint and its material allegations is error. *Id.*

48. The swearing of the jury to try the issue "whether the defendant is

PRACTICE—(*Continued.*)

the father of the bastard child of the plaintiff," that being the issue framed by the court against the objection of the defendant, as this issue assumes that a child has been born and is a bastard, is error; it is also erroneous in that the State, and not the complaining witness, is the plaintiff, and the issue is between the State and the defendant, and not between the witness and the defendant. *Id.*

49. The judgment in proceedings of this character, if against the accused, should be in favor of the State, and not in favor of the complaining witness, the mother of the child. *Id.*

50. The expenses attending the birth of a bastard child, when allowed by the court under the statute, should be ascertained by proofs and not otherwise, so that the defendant may have an opportunity to contest the facts. *Id.*

51. The form of the judgment ordered in such cases should be in strict compliance with the directions of the statute. *John D. C.* v. *State ex rel.*, 554.

52. In a common law case an appeal lies only after a final judgment. *City of St. Augustine* v. *Usina*, 829.

II. EQUITY. (Including Code cases of an equitable nature), see *Master in Chancery, Tender.*

1. The wife's *separate estate* is an equitable estate where the legal title is vested in some other person for her benefit, and the trustee is a necessary party to a suit seeking to charge such estate. *Dollner, Potter & Co.*, v. *Snow et als.*, 86.

2. In such case the complaint must set up the nature of the trust, and show that such a charge is consistent with and conformable to the law of the trust as disclosed by the deed or settlement which created it. *Id.*

3. It is not a good answer to a creditor's bill that the liability of one of the defendants as a special partner was limited by the articles of copartnership. Such plea should be made, if at all, when the original suit was brought. The judgment fixed the liability. *Loring* v. *Dunning & Palmer, et als.*, 119.

4. A court of equity will not entertain a bill for an injunction against a tax-collector who threatens to seize personal property without lawful authority, as such seizure would be a mere trespass remediable in a court of law. *Baldwin* v. *Tucker*, 258.

6. A suit in equity to recover the possession of lands under a legal title and for mesne profits, cannot be maintained. All the issues of law and fact in regard to the title and the rents and profits may be tried in a court of law. *Cavedo* v. *Billings, et al.*, 261.

6. Where there is a plea and an answer in support thereof, the answer cannot be regarded as a defence independent of the plea. When such a plea is set down for argument, the matter of the answer should be considered in connection with the plea, and an order

PRACTICE—(*Continued.*)

overruling the plea disposes of the plea and answer. *Hart* v. *Sanderson's Adm'rs*, 264.

7. Where in such case the court, in disposing of the plea, confines itself to the consideration of the formal plea, independent of the answer in support thereof, it is error. *Id.*

8. After the plea is overruled in such case, it is error to set the cause down for hearing upon the bill and the answer in support of the plea. *Id.*

9. The recital in a bill brought by an assignee to recover assets which passed under the assignment that he is also a creditor of the insolvent debtor, does not render the bill multifarious. *Keyser, Judah & Co.* v. *Simmons, et als.*, 268.

10. Chancery practice forbids a direct taxation of costs as between solicitor and client against defendant; and the Code practice is not different in this respect. *State* v. *Florida Central R. R. Co.*, 703.

11. Where the counsel has been employed to obtain or create a fund for the joint benefit of both parties, his fees, if he prevails, not if he loses, may be paid out of the funds; but where the interests of the parties are adverse, only the legal taxable costs can be allowed. *Id.*

12. Notwithstanding an order directing a complaint to be dismissed, if the court has in its possession funds which have accrued from the management of the property, the subject-matter of the suit, it may direct payment of claims incurred for the protection and preservation of the property during the action. *Id.*

13. The Circuit Courts under the Constitution of this State have no power to have a sale by their own officers by virtue of their decree of property in another circuit. Their authority in such cases does not extend beyond establishing the rights and defining the liens of the several parties before them. *State, et al.*, v. *J. P. & M. R. R. Co., et al.*, 708.

14. A case should not be remanded with directions to modify a judgment therein made, unless the proofs in the record authorize such modification. The existence of *bona fide* purchasers of State bonds is not established by the proofs in this case so as to authorize a final judgment, and this court should not direct any action to be had based upon the existence of such fact. This court is controlled by the record. *Id.*

15. Where the evidence of a debt alleged to exist is a note, bond or mortgage, the party seeking a final decree based thereon should produce such note, bond or mortgage. *Id.*

16. There cannot be in the same case two inconsistent final judgments covering the same subject-matter against the same defendant, based upon the same pleadings by the same plaintiff. The first judgment covering the subject must stand until it is reversed or opened and vacated. *Id.*

PRACTICE—(*Continued.*)

17. Under the statutes of this State and the Code practice as modified, an appeal lies from a final judgment by default, which is similar in its character to a decree *pro confesso* under the practice anterior to the Code. Such judgment must conform to the matter of the pleadings of which defendant has notice, the plaintiff not being allowed to take such decree as he can abide by. A judgment by default, inconsistent with the case made in the original complaint and conforming to a new case made by an amended and supplemental complaint, filed three months after service of summons upon the defendant, without notice to him, is not authorized by the Code practice as modified by statute in this State. *Id.*

18. Bill filed by an executor against a co-executor to recover a *pro rata* share of compensation and commissions allowed by the order of the probate court and paid to and retained by the co-executor, who refuses to pay over the share claimed by the complainant: *Held*, That the remedy at law is plain and adequate, no discovery is necessary, and chancery has no jurisdiction. *Bellamy* v. *Hawkins*, 733.

19. A mortgagee seeking the foreclosure of a mortgage can have only such debts established as are within the terms of the mortgage. *Tunno and Jessup & Co.* v. *Robert*, 739.

20. "Proof by affidavit to the judge" that the order requiring a defendant resident of another State to appear and answer has been published in the manner and for the time prescribed by law, is one of the requirements of the statute in order to perfect a constructive service. This proof must be made before the judge can grant an order taking the bill for confessed. *Id.*

21. A cross bill is a pleading which necessarily precedes a final decree. Up to the hearing it is proper for the court upon proper showing under oath to permit such a bill to be filed. It is proper so to do when it appears that the suit as instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of the parties. *Finlayson* v. *Lipscomb*, 751.

22. Leave to file a supplemental bill in the nature of a bill of review should not be granted in a case where it is apparent that for months before publication and hearing, a reasonable degree of diligence on the part of the party would have resulted in his ascertaining the new evidence proposed to be brought forward. Where the new evidence appears to be the testimony of named witnesses and the other requirements of the law are complied with, the petition should be accompanied by the affidavits of such persons to the new facts alleged, or some good reason be given why they were not produced. Some of the cases upon the subject of leave to file a supplemental bill in the nature of a bill of review considered. *Id.*

23. Where, in a foreclosure suit, the defence is a satisfaction of a mortgage debt, and the evidence in the case upon the part of the plaintiff consists of the debt established by judicial proceedings and outstanding

PRACTICE—(*Continued.*)

up to the institution of the suit, the mortgage, and plaintiff's denial of any payment or satisfaction, and the evidence upon the part of the defendant is his own testimony in direct conflict with this written evidence and the testimony of the plaintiff, the testimony of defendant's son, which is uncertain and indefinite, and to part only of a conversation between the parties, and the testimony of a third party not plainly in conflict with plaintiff's testimony, the court should find for the plaintiff. Especially is this true when the assault upon the mortgage debt involves the regularity and propriety of proceedings in a collateral suit. Under the peculiar circumstances of this case the decree is affirmed without prejudice to any right to proceedings which the defendant may have, looking to a re-sale of the property alleged to have been sold by the fraud and covin of the plaintiff at a price less than its value, or to file an original bill to set the sale aside, or to his action for damages. *Id.*

24. A general demurrer to a bill, as for want of equity, will be overruled if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer. *Thompson* v. *Maxwell*, 773.

25. Where, upon a foreclosure of mortgage, after decree and sale it is found that a portion of the lands described in the mortgage (a copy of which was annexed to the bill) were not properly described in the bill of foreclosure, a bill of review may be filed for the purpose of correcting the error in the bill and setting aside the decree and sale as to the land erroneously described; or setting aside the decree in *toto* if necessary, and obtaining a sale of the mortgaged lands. *Id.*

26. An injunction should not be granted unless the bill contains a prayer therefor, nor should an injunction to stay proceedings at law be granted without bond and securities prescribed by statute, except in cases otherwise specially provided for by law. *Id.*

27. A mortgagee cannot restrain the prosecution of a suit in ejectment (brought by a purchaser under a junior lien) against a mortgagor or his tenant. *Id.*

28. A service of subpœna upon a sheriff, as *ex-officio* administrator, before he has been ordered by the Judge of Probate to take charge of the estate of a deceased mortgagor, does not authorize a decree *pro confesso*. *Wilson's Adm'r, et als.* v. *Dibble*, 782.

29. Where there is a total absence of parties against whom a decree can be made, a plea in abatement should be sustained. *Id.*

30. Where parties holding a deed executed for the purpose of securing them for money due and advances to be made, and they on delivery of the deed gave to the grantor an agreement to convey to the grantor, on payment of a sum named, the interest of the grantees is a mortgage interest; and if they have taken possession of the premises against the consent of the grantor, and without foreclo-

PRACTICE—(*Continued.*)

sure, his proper remedy against them is at law, and not in equity, to recover the possession. *Endell & Son* v. *Walls*, 786.

31. The fact that complainant's property was taken possession of by a mortgagee without foreclosure, while complainant was in custody of a committee as an adjudged lunatic, does not give him, after the restoration of his reason, a right to recover possession of his land by bill in chancery. *Id.*

III. CRIMINAL. (See CRIMINAL LAW.)

PRESUMPTIONS. See *Evidence*, 7; *Office and Officer*, 2.

PRINCIPAL AND INTEREST.

1. Pending the consummation of a sale of land an injunction restraining it was served on the parties, at the suit of a third person; afterwards, by an arrangement by stipulation of the parties, including the plaintiff in the injunction suit, a conveyance of the land was made and the consideration secured by notes and mortgage payable at a day certain, one note without interest and others with interest, which notes and mortgage were deposited with a party in trust, subject to the determination and decree of the court in an injunction suit: *Held*, That the injunction was waived and did not attach to the notes and mortgage, and did not relieve the maker of the notes from the payment of interest thereon after maturity, and he was not restrained by the injunction, or by the arrangement, from paying or tendering the money to the holder when due, according to the legal effect of his promise. *Chandler & Wittich* v. *Wright*, 510.

2. A verdict, "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876," expresses sufficiently the intention of the jury; the time for which such interest is to be computed and the rate are fixed. The clerk can make the necessary calculation and embody the amount in the judgment. *Simpson & Co.* v. *Daniels*, 677.

PRINCIPAL AND SURETY.

1. At the date of a bond given by a Collector of Revenue, conditioned for the faithful discharge of his duties, the law provided that if any Collector should, without good and sufficient excuse, neglect to pay over, according to the requirements of law, any money collected by virtue of his office, he should be deemed guilty of embezzlement and punished by imprisonment, &c. Afterwards the Legislature repealed this law. In a suit against the Collector and his sureties upon the bond, the latter pleaded that they were discharged by such repeal, by reason that the bond was executed in view of the penal statute; that its existence was an inducement to their signing the bond, and that the repeal deprived them and the State of a remedy against the Collector to enforce payment of money collected by him. On demurrer to this plea: *Held*, That it did not set up a defence in

PRINCIPAL AND SURETY—(*Continued.*)

favor of the sureties against a breach of the condition of the bond. *State* v. *Smith, et als.*, 175.

2. The sureties pleaded that after the Collector had begun to neglect his duties, they demanded of the Governor that he suspend the Collector and appoint another to perform the duties under the provisions of an act of the Legislature; but the Governor neglected and refused so to do, and the default of the Collector alleged in this suit occurred subsequent to this request, whereby the obligors claim that they are not liable. On demurrer to this plea: *Held*, That this plea did not set up a defence to the action; that the laches or neglect of the officer of the Government in such case did not relieve the sureties. *Id.*

3. Sureties on the bond of an officer of a private corporation whose office is annual, with power in him to hold until his successor is elected and qualified, are bound only for the year for which he was chosen and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer. Guaranteeing the good faith and honesty of such officer "during his continuance in office," means not an indefinite period, or for the time he may possibly hold such office by new elections, but his continuance in office under his then election and for the legal term. *Mutual L. & B. Association* v. *Price & Price*, 204.

4. Sureties upon such bond are not discharged by the neglect of the officers of the corporation to have, as prescribed by the constitution and by-laws of the corporation, periodical examination of the books of the officer whose sureties they are. Mere laches, unaccompanied with fraud, is no ground of discharge. *Id.*

5. A suit by a co-surety against the heirs of a deceased co-surety for contribution is not barred by the statute of non-claim, the administrator having published the notice required by that statute and been discharged and the estate distributed before the cause of action accrued as between the sureties upon their bond. *Gibson* v. *Mitchell, et als.*, 519.

6. After the discharge of an administrator by due course of law and the distribution of the estate to the heirs, a suit in equity for contribution may be maintained against the heirs by a co-surety of the decedent, whose claim arose after the discharge, to the extent of the property or its value which came to the heirs. *Id.*

7. Such suit is not a suit against heirs upon the bond of the ancestor to recover a personal judgment against them, but is in the nature of a suit *in rem* to reach the property of the ancestor. The decision in this case does not conflict with Gilchrist vs. Filyau, 2 Fla. R., 94. *Id.*

PROBATE JUDGE AND COURT. See *Jurisdiction, (of Probate Court or Judge)* 1, 2, 3.

PROCESS. See *Practice, (Equity)* 20, 28; *(Law)*, 36.

PROMISSORY NOTE. See *Husband and Wife*, 4; *Collector of Revenue*, 2, 3.

QUO WARRANTO.

1. A pilot is not an officer within the meaning of the Constitution and statutes of this State; he is a person invested by law with peculiar powers and privileges connected with commerce, for the exercise of which a qualification is required by the State. The privileges and powers which he has, being of a public nature, resulting from legislative grant, are franchises. If he is exercising such franchises without the qualification prescribed by the State, an information in the nature of a *quo warranto* may be brought by the Attorney-General. *State, ex rel.*, v. *Jones*, 306.

2. A plea is a sufficient response to an information in the nature of a *quo warranto*, if it sets up facts showing a right to exercise the office or franchise alleged to have been usurped. Where a statute prescribes a qualification for exercising an office or franchise, the plea need not be framed in the words of the law. It is sufficient if the facts set up show clearly the right. *Id.*

RAILROADS. See *Common Carriers, Corporations, Florida State Bonds, Internal Improvement Act and Fund.*

1. Franchises which are incorporeal hereditaments of an intangible nature, are not embraced within the meaning of the terms "lands or tenements" in the act regulating the proceeding of unlawful detainer. *Hence*: *Gibbs, et al*, v. *Drew*, 147.

2. A railroad being a public work, the possession of which is necessarily attended by the right and duty to use and employ the franchises granted by the sovereign in connection with it, an action of unlawful detainer does not lie to recover possession of a part thereof, as this involves the right to and the public duty of exercising these franchises. *Id.*

3. Under the provisions of the statutes regulating the exchange of State bonds with the Jacksonville, Pensacola and Mobile Railroad Company for its bonds, the State was to occupy two relations to the purchasers of the bonds of the State. The first was that of primary debtor to the holder, and the second was that of trustee holding the bond of the company and the lien created by the act to secure payment to the party who advanced money to the company. The Legislature had no authority to create the first relation. It did have power to create the second, and a decree based upon the relation of primary debtor as fixed by the statute is erroneous. The case of Holland vs. The State of Florida, 15 Fla., 456, and the case of the State of Florida, *et al.*, vs. the Florida Central Railroad Company, *et al.*, 15 Fla., 724, commented upon and followed, so far as applicable to this case. *State and Trustees* v. *J. P. & M. R. R. Co., et al.*, 708.

RECEIVER. See *Funds in Court; Practice, (Equity)* 11, 12.

RECORDS OF COURT. See *Amendment.*

A court of record has inherent power to correct the mistakes of its officers, so that its records may speak the truth as to its action. Clerks of the Circuit Court have no authority to enter a judgment after the expiration of the term, upon a verdict rendered in term. Such an entry, though placed in the minutes as being rendered during term, may be inquired into by the court at a subsequent term, and if no such judgment was rendered by the court, such entry should be corrected. The corrections may be made upon parol evidence, and the presumption in this court is that there was sufficient to justify the action of the Circuit Court. *Sedgwick* v. *Dawkins,* 198.

REMITTITUR.

D. brought his action against S. to recover damages sustained by reason of S's. negligence to one hundred and one pieces of hewn timber. On the trial it appeared that one D. S. was jointly interested with the plaintiff in twenty-one pieces, and that P. was also jointly interested with plaintiff in thirty-two pieces. The jury found for the plaintiff and assessed his damages as sustained on the whole one hundred and one pieces. The defendant S. moved for a new trial, and the plaintiff D. having, before judgment, remitted the average damages on the fifty-three pieces in which D. S. and P. were interested, the motion was denied, and judgment ordered for an amount equal to the average of the damage sustained by the plaintiff D. on the timber owned by him alone: *Held,* To be no error, the evidence showing the timber to be of like quality and value, and the damage having been calculated and arrived at by an average of the whole. *Simpson & Co.* v. *Daniels,* 677.

RULES OF PRACTICE. See *Appeals,* 1, 7; *New Trial,* 1, 2.

SENTENCE. See *Criminal Law,* 5.

SEPARATE ESTATE OF WIFE. See *Husband and Wife.*

SET-OFF. See *Ejectment,* 5.

SHERIFF. See *Administrators and Executors,* 6; *Evidence,* 2; *Parties,* 1.

STATE.

No officer can bind either the State or county unless there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced. *County of Nassau* v. *Downie,* 171.

STATUTES CONSTRUED AND REFERRED TO.

AGRICULTURAL COLLEGE.

Chapters 3045, 1766, 1905, Laws; Act of Congress July 2, 1862. *State, ex rel.* v. *Knowles, et als.,* 577.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

ALTERING MARKS OF ANIMALS.

Chapter 1637, Chapter IV., Section 51, Laws.
Story & Sullivan v. *State*, 564.

AMENDMENT.

Chapter 1096, Laws.
Loring v. *Wittich*, 617.

APPEALS, TIME IN WHICH CAN BE TAKEN.

Chapter 3008, Laws.
Alvord, Kellogg & Campbell v. *Little*, 158.

APPRENTICE.

Thompson's Digest 227, Chapters 1471, 1557, Laws; 5 Eliz. Ch. 4, §31; 54 Geo. III., Ch. 96.
State, ex rel. v. *Jones*, 306.

BAILIFFS.

Chapters 47, 1815, 1981, Laws.
County of Nassau v. *Downie*, 171.

BASTARDY.

Thompson's Digest, 228, 229.
John D. C. v. *State, ex rel.*, 554.
Andrew G. v. *Catherine A.*, 830.

BILL OF PARTICULARS.

Chapter 1096, Section 3, Laws.
Loring v. *Wittich*, 617.

BONDS OF THE STATE OF FLORIDA.

Chapters 1716 and 1731, Laws.
Trustees I. I. Fund v. *J. P. & M. R. R. Co.*, 708.

CLAIMANTS, OCCUPYING.

Chapter 233, Laws.
Duncan, et al. v. *Jackson, et als.*, 338.

COLLECTORS OF REVENUE.

Chapter 1713, Section 52, Laws.
State v. *Smith, et als.*, 175.
Chapter 1966, Section 65, Laws.
State, ex rel. v. *Drew*, 303.

COSTS, POWER TO REQUIRE SECURITY FOR OR DEPOSIT TO COVER IN SUPREME COURT.

Chapter 1938, Laws; Statute of Gloucester, 6 Ed. I. Ch. 1, § 2.
Robinson v. *Roberts*, 156.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

CRIMINAL PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

Chapter 2093, §§ 1 and 14, Laws; Chapter 1693, §1, Laws.
Ex-parte, Alfred Hunter, 575.

DECREE PRO CONFESSO.

Thompson's Digest, 452.
Tunno and Jessup & Co. v. *Robert*, 738.

DISCRETION OF COURT.

Chapter 1096, Section 34, Laws.
State, ex rel. v. *Jones*, 306.
Chapter 1628, Section 28, Laws.
Coker v. *Merritt's Ex'r*, 416.

EJECTMENT.

Chapters 233 and 999, Laws.
Duncan, et al. v. *Jackson, et als.*, 338.

ELECTION LAW.

Chapter 1868, Section 4, Laws.
State, ex rel. v. *Board of State Canvassers*, 17.

ENGLISH STATUTES.

5 Eliz., Ch. 4, §31; 54 Geo. III., Ch. 96.
State, ex rel. v. *Jones*, 306.
Statute of Gloucester, 6 Ed. I., Ch. 1, §2.
Robinson v. *Roberts*, 156.
Statute of Westminister, II.
Coker & Scheiffer v. *Hayes*, 368.
29 Chas. II.
Tates' Adm'r v. *Jones' Ex'r*, 216.
5 Geo. I., Ch. 13; Thomp. Comp. Eng. Statutes (manuscript), p. 38.
Loring, et al. v. *Wittich*, 323.

EXCEPTIONS, BILL OF.

Thompson's Digest, 351, §3.
Robinson v. *Matthews*, 319.
Mayo v. *Hynote*, 673.

EXCEPTIONS TO CHARGE OF JUDGE TO JURY, AND TO PROCEEDINGS.

Code of Procedure (Chapter 1819), Section 210, Statute of Westminister II.
Coker & Scheiffer v. *Hayes*, 368.

EXEMPTION OF PROPERTY FROM FORCED SALE.

Chapter 1715, Sections 7 and 8, Laws.
Loring v. *Wittich*, 498.

FALSE PRETENCE.

Chapter IV., Section 50 of Chapter 1637, Laws.
Hamilton v. *State*, 288.

STATUTES CONSTRUED AND REFERRED TO—*(Continued.)*

INJUNCTION BOND.

Thompson's Digest, 454; Chapters 526 and 1098, Laws.
Thompson v. *Maxwell*, 773.

INTERNAL IMPROVEMENTS.

Capters 610, 936, Laws.
Trustees I. I. Fund v. *St. Johns Railway Co.*, 531.
Trustees I. I. Fund, et al. v. *J. P. & M. R. R., et al.*, 708.
Act of Congress, September 28, 1850.
Id.
Chapters 610, 734, Laws.
State, ex rel. v. *Sullivan*, 791.

JUDGMENTS OF JUSTICES OF PEACE, FILING TRANSCRIPT IN CLERK'S OFFICE AND ISSUING EXECUTION ON.

Chapter 2040, Sections 43, 44, Laws.
Bucky v. *Willard*, 330.

JURORS AND JURY.

Chapters 47, 1815, 1981, Laws, (Thomp. Dig., 438-9.
County of Nassau v. *Downie*, 171.
Chapters 2046, 1628, 2043, 3010, Laws.
Gibson v. *State*, 291.
Chapter 1628, Section 28, Laws.
Coker v. *Merritt's Ex'r*, 416.

LANDLORD AND TENANT.

Chapter 2044, Laws.
Barnett v. *Togni*, 328.

MORTGAGE.

Thompson's Digest, 180, Section 4.
Thompson v. *Maxwell*, 773.

MOTION FOR NEW TRIAL OR IN ARREST OF JUDGMENT, FILING OF REASONS FOR.

Thompson's Digest, 351, Section 2, paragraph 1.
Dupuis v. *Thompson*, 69.
Sedgwick v. *Dawkins*, 198.

NEW YORK CORPORATION ACT.

Flash, Lewis & Co. v. *Conn*, 428.

NON-CLAIM, STATUTE OF.

Thompson's Digest, 206, 207.
Gibson v. *Mitchell, et als.*, 519.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

OFFICE, TENURE OF, OF CIRCUIT JUDGES.

Chapter 1633, Section 2, Laws.
Advisory Opinion, 841.

PILOTS, APPRENTICESHIP OF.

Chapter 1893, Section 3, Laws.
State ex rel., v. *Jones*, 306.

REAL ESTATE TO BE CONSIDERED ASSETS.

Thompson's Digest, 202, Sec. 7, par. 2, Chapter 1732, Laws.
Scott v. *Lloyd, et ux.*, 151.

REVIVAL OF STATUTES.

Thompson's Digest, 22.
County of Nassau v. *Downie*, 171.

SALE OF LANDS TO PAY DEBTS OF TESTATOR OR INTESTATE BY PROBATE JUDGE.

Thompson's Digest, 202, 203.
Hays' Adm'x v. *McNealy*, 409.

SALE OF PROPERTY BY FEME COVERT.

Section 4, act March 6th, 1845; Thompson's Digest, 221, section 5.
Tunno and Jessup & Co. v. *Robert*, 738.

SHERIFF.

Thompson's Digest, 198-9; Chapter 157, section 3, acts of 1848.
Wilson's Adm'r, et al., v. *Dibble*, 782.

SEPARATE ESTATE OF MARRIED WOMEN.

Thompson's Digest, 221, act March 6, 1845.
Dollner, Potter & Co, v. *Snow, et al.*, 86.

SERVICE BY PUBLICATION.

Thompson's Digest, 452.
Tunno and Jessup & Co. v. *Robert*, 738.

SETTING ASIDE EXECUTION ISSUED BY CLERK OF CIRCUIT COURT ON JUSTICES' JUDGMENT.

Thompson's Digest, 360, Section 6.
Bucky v. *Williard*, 330.

STATUTE OF FRAUDS.

Thompson's Digest, 217, 218; 29 Charles II.
Tate's Adm'r v. *Jones' Ex'r*, 216.
Thompson's Digest, 177, 218.
Tunno and Jessup & Co. v. *Robert*, 738.

STATUTES CONSTRUED AND REFERRED TO—(Continued.)

UNLAWFUL DETAINER.

Chapter 1630, Laws.
Gibbs, et al., v. *Drew*, 147.

VENUE IN ATTACHMENT CASES.

Thompson's Digest, 369, 370, 326.
Canova v. *Colby & Gould*, 167.

WITNESS.

Chapter 1983.
Tunno and Jessup & Co. v. *Robert*, 738.

WRIT OF ERROR, AMENDMENT OF.

5 George I., Ch. 13; Thomp. Comp. Eng. Statutes, (Manuscript) page 38; Chapter 1096, Section 74, Laws; acts of Congress, June 1st, 1872, Chapter 255, Section 3, Volume 17, page 196.
Loring, et al., v. *Wittich*, 323.

WRIT OF ERROR IN HABEAS CORPUS CASES.

Thompson's Digest, 529, 530, 446, 447.
Tyler v. *Painter*, 144.

STATUTE OF FRAUDS.

1. In pursuance of a parol agreement for the sale and conveyance of lands, the purchaser paid the price agreed on in full; the purchaser was a tenant at will, in possession at the time of making the agreement, and afterwards remained in possession, erected a dwelling house and fences, enlarged the enclosures, cultivated the land, set out fruit trees and pruned the trees already grown, and treated the property as his own, enjoyed it as the home of his family, receiving the crops and the proceeds of the fruit for years, with the knowledge and without objection by the seller or his heirs or representatives: *Held*, Upon bill filed for a specific execution of the agreement:

2. That upon a parol agreement for the sale of lands, the payment of the purchase price alone is not sufficient to take the case out of the statute of frauds. *Tates' Adm'r* v. *Jones' Ex'r*, 216.

3. That the payment of the purchase-money, followed by delivery of possession, under a parol agreement for a sale of lands, or followed by a continued possession by the purchaser, (if already in possession,) and circumstances showing that the subsequent possession was inconsistent with the original tenancy, and was consistent only with, and legitimately referable to the agreement for a purchase and sale, constitute such part performance that the seller is estopped from insisting that the agreement was not signed, and a specific execution of the agreement may be decreed. *Id.*

4. There is no rule that the improvements made by a purchaser under a

STATUTE OF FRAUDS—(*Continued.*)

parol agreement for the purchase of lands shall be of any specified value, in order to warrant the inference that they were made with reference to the contract. It is enough that they are of such a character, and made under such circumstances, that it will be inferred that they were made because of the agreement to convey. *Id.*

STATUTE OF LIMITATIONS.

1. A promise by a member of a late copartnership, made after dissolution and before a suit is barred by the statute of limitations, to pay a partnership debt, will not prevent the running of the statute so as to estop the other partner from availing himself of the defence of the statute as against the orighial cause of action; and this whether the creditor was aware of the dissolution or not. *Tate* v. *Clements*, 339.

2. Nor does an admission by one partner, after dissolution, that a debt is due, bind the other late partner so as to take the case out of the statute as to the latter. *Id.*

3. The "cause of action" in a suit for goods sold is the express or implied promise to pay, and a promise by the party sought to be charged, or facts from which a promise legally results, within the period of the statute of limitations, must be shown to defeat the operation of the statute. *Id.*

4. A member of a copartnership, after the dissolution, has no agency growing out of the former partnership relation to create or perpetuate a liability of his late copartner for partnership indebtedness as against the operation of the statute of limitations. *Id.*

5. A suit by a co-surety against the heirs of a deceased co-surety for contribution is not barred by the statute of non-claim, the administrator having published the notice required by that statute and been discharged and the estate distributed before the cause of action accrued as between the sureties upon their bond. *Gibson* v. *Mitchell, et als.*, 519.

6. The presentation of such claim to the discharged admiinstrator is of no effect. *Id.*

7. After the discharge of an administrator by due course of law and the distribution of the estate to the heirs, a suit in equity for contribution may be maintained against the heirs by a co-surety of the decedent, whose claim arose after the discharge, to the extent of the property or its value which came to the heirs. *Id.*

8. Such suit is not a suit against heirs upon the bond of the ancestor to recover a personal judgment against them, but is in the nature of a suit in *rem* to reach the property of the ancestor. The decision in this case does not conflict with Gilchrist vs. Filyau, 2 Fla. R., 94. *Id.*

STATUTE OF NON-CLAIM. See *Statute of Limitations*, 5, 6, 7, 8.

STATUTORY SEPARATE PROPERTY OF WIFE. See *Husband and Wife.*

STOCKHOLDERS. See *Corporations.*

SUPERSEDEAS. See *Writ of Error*, 3; *Appeals*, 2.

SUPPLEMENTAL BILL IN NATURE OF BILL OF REVIEW. See *Pleading*, 15.

SUPREME COURT. See *Appeals, Jurisdiction (of Supreme Court), Practice (Equity)*, 14; *Writ of Error.*

SURETIES. See *Principal and Surety.*

SURETIES OF THE PEACE. See *Criminal Law*, 1, 2.

SURPRISE. See *New Trial*, 9.

SURPLUSAGE. See *Mandamus*, 5; *Criminal Law*, 5.

TAXATION AND TAXES.

1. A note whereby the maker promises to pay a sum of money "for value received on account of taxes on the property of the estate of L. and others for the year 1872," does not give a right of action to the payee, as the law does not recognize this mode of collecting taxes, and there is no allegation in the declaration that payee had paid the taxes for or at the request of the maker. *Dickson* v. *Gamble*, 687.
2. A tax-collector cannot enforce a note given him for taxes which it is his duty to collect, particularly as it is not alleged that he paid or discharged the taxes mentioned at the request of the maker. *Id.*
3. Whether the publication of the list of lands advertised to be sold for unpaid taxes by a collector creates the relation of debtor and creditor as between the collector and the publisher, *quere?*
4. Commission for collecting taxes. See *Collector of Revenue*, 1.
5. Exemption from taxation and contracts as to such exemption. See *Constitutional Law*, 17, 18.
6. Injunction against collection of taxes. See *Injunction*, 1, 5.

TENDER.

A tender of a sum less than the amount due upon the note is of no avail. *Chandler & Wittich* v. *Wright*, 510.

TRESPASS. See *Injunction*, 1.

TRUSTS AND TRUSTEES. See *Mortgage*, 1, 7, 8; *Internal Improvement Act and Fund*, 1, 2, 3, 4, 5, 6, 7; *Florida State Bonds*, 1, 3; *Railroads*, 3; *Husband and Wife*, 1, 2, 5.

UNLAWFUL DETAINER.

1. Franchises which are incorporeal hereditaments of an intangible nature are not embraced within the meaning of the terms "lands or

UNLAWFUL DETAINER.—(*Continued.*)

tenements" in the act regulating the proceeding of unlawful detainer. *Hence*: *Gibbes, et al.* v. *Drew*, 147.

2. A railroad being a public work, the possession of which is necessarily attended by the right and duty to use and employ the franchises granted by the sovereign in connection with it, an action of unlawful detainer does not lie to recover possession of a part thereof, as this involves the right to and the public duty of exercising these franchises. *Id.*

3. Heirs at law are not proper plaintiffs in an action for unlawful detainer where defendant is in possession under a lease made by the ancestor in her life time. The right of possession, and consequently the right of action, passes to the administrator or executor as an incident of the asset. *Scott* v. *Lloyd, et ux.*, 151.

VENDOR'S LIEN. See *Internal Improvement Act and Fund*, 5.

VENUE.

1. The trial of the issues of fact upon the traverse of the affidavit upon which a writ of attachment was issued, if a jury be demanded, must be had in the county where the suit is pending. *Canova* v. *Colby & Gould*, 167.

2. *Semble*: That the affirmative of the issues of fact upon such traverse is with the plaintiff; he must prove the truth of the allegation in the affidavit to the satisfaction of the court or jury, in order to sustain his writ. *Id.*

VERDICT.

A verdict that "We, the jury, find for the plaintiff, and assess his damages at $1,662.40, with legal interest from the 1st September, 1876," expresses sufficiently the intention of the jury; the time for which such interest is to be computed and the rate are fixed. The Clerk can make the necessary calculation and embody the amount in the judgment. *Simpson & Co.* v. *Daniels*, 677.

WAIVER. See *Injunction*, 2.

WITNESSES. See *Evidence.*

1. In an action of bastardy the mother has an interest in the result which may be taken into consideration by the jury in considering her credibility as a witness, and the court should have so instructed the jury when requested so to do by the defendant's counsel. *John D. C.* v. *State, ex rel.*, 554.

2. To authorize a witness to testify as to the reputation of another for truth and veracity in order to impeach him, it is not necessary that he should know what a majority of his neighbors or associates say or think of his character for truth. *Robinson* v. *State*, 835.

3. If a witness testifies that he knows the reputation for truth and veracity of the party to be impeached where he lives, the questions as to

WITNESSES—(*Continued.*)

whether the reputation is good or bad, and whether from that reputation he would believe him under oath, are proper. *Id.*

4. The opposing party can, upon cross examination, ascertain the extent of the information of the witness, and the sources of his knowledge. *Id.*

5. A juror after solemnly entering his verdict in court is not to be believed or heard whenever he afterwards swears that he never approved or consented to the verdict. After the return and affirmance of a verdict in open court the testimony of jurors as to the motives and influences by which their deliberations were governed should not be received. *Coker & Scheiffer* v. *Hayes*, 368.

WORDS.

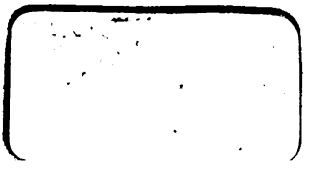
CAUSE OF ACTION. See *Partners and Partnership*, 11.
DURING HIS CONTINUANCE IN OFFICE. See *Principal and Surety*, 3.
HEAD OF FAMILY RESIDING IN THIS STATE. See *Exemptions, &c.*, 1.
LANDS AND TENEMENTS. See *Unlawful Detainer*, 1.

WRIT OF ATTACHMENT. See *Attachments.*

WRIT OF ERROR. See *Appeals; Habeas Corpus*, 1, 2.

1. A writ of error issued to bring up a judgment wherein the plaintiff in error and nine others were parties defendant, being responded to by sending the record of a judgment wherein the plaintiff in error is the only party defendant, will be quashed on motion. *Loring, et al.*, v. *Wittich*, 323.

2. If, however, before entry of the order, the plaintiff in error moves to amend the writ so as to make it conform to the record, this court may, under its statutory powers, allow the amendment. The practice in England and the United States as to amending writs of error considered. *Id.*

3. An order of the Circuit Judge refusing to allow a supersedeas upon an appeal from the County Judge in a case at law, is not a final judgment from which an appeal or writ of error will lie. *Barnett* v. *Togni*, 328.

Semble: There is no provision of the Constitution or statutes authorizing a review in the Supreme Court, by appeal or writ of error, of a determination by the Circuit Court upon an appeal from a judgment of the County Judge in proceedings before him, relating to the unlawful detention of lands and tenements. *Id.*